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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 358.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

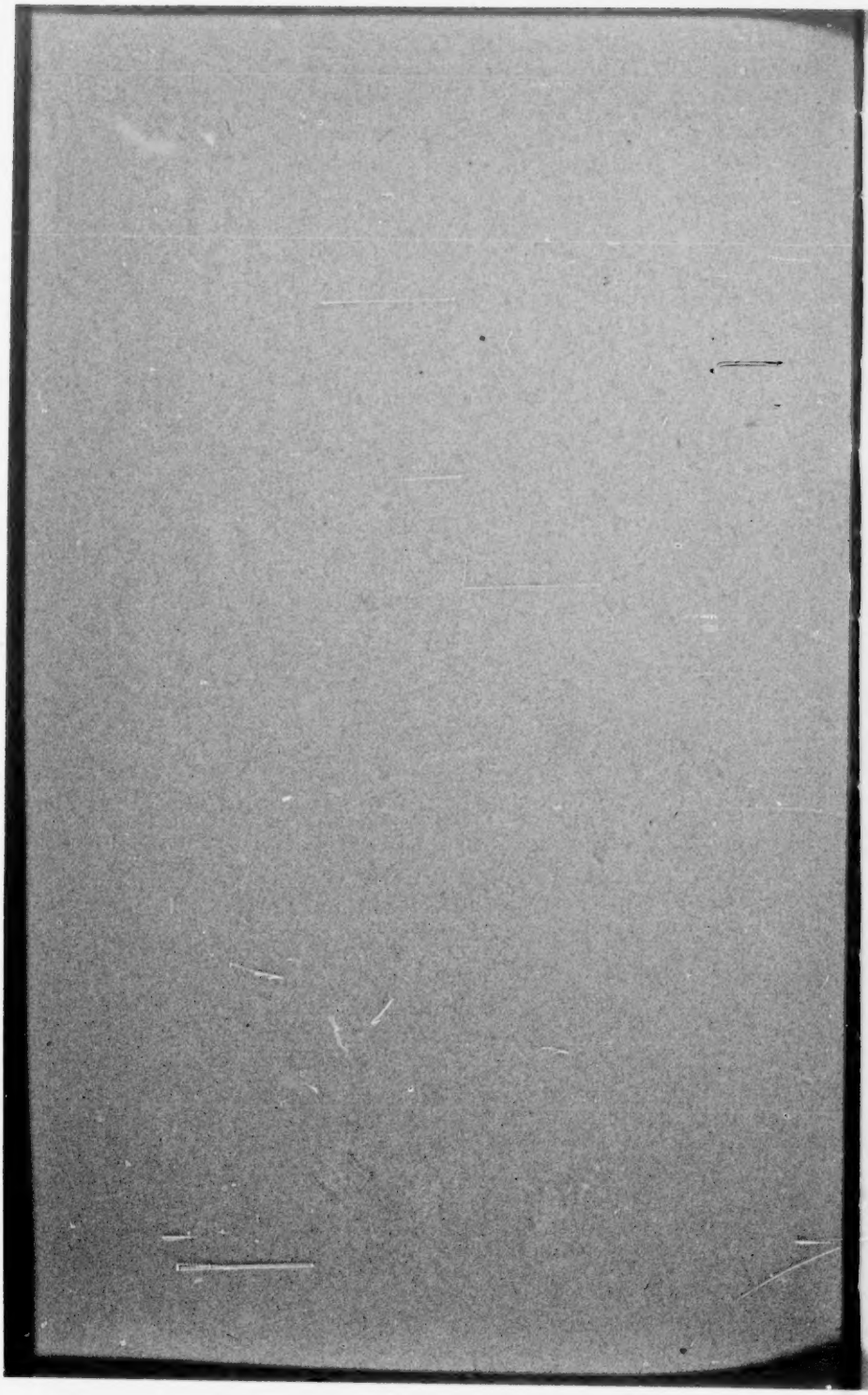
vs.

W. E. PRESCOTT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED FEBRUARY 20, 1915.

(24,570)



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a STATE OF SOUTH CAROLINA:

In the Supreme Court.

I, U. R. Brooks, Clerk of Supreme Court, do hereby certify that the following papers hereto attached completes the Record in the case of W. E. Prescott, Respondent, against Southern Railway Company, appel-ant, viz: Copy of Case, Certified copy of the opinion, Certified copy of the Bond, Writ of Error, Citation, Petition and Assignment of Error.

Given under my hand and the seal of the Supreme Court, at Columbia, this 30th day of January A. D. 1915.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS, *Clerk.*

1 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Eleventh Circuit, Edgefield County, April Term, 1914.

T. H. Spain, Trial Judge.

W. E. PRESCOTT, Plaintiff-Respondent,
against
SOUTHERN RAILWAY COMPANY, Defendant-Appellant.

CASE.

J. Wm. Thurmond, Attorney for Plaintiff-Respondent.
N. George Evans and B. L. Abney, Attorneys for Defendant-Appellant.

This was an action for damages to recover the value of freight lost by fire at Edgefield. Valued at $236.35 and $5.43 freight paid on same. Verdict for plaintiff for full amount.

2 *Complaint for Relief.*

The plaintiff herein, complaining of the defendant above named, alleges:

For a First Cause of Action.

1. That the plaintiff is informed, believes, and alleges, that the defendant, Southern Railway Company, is, and at the times mentioned in this complaint was, a corporation duly organized and incorporated under the laws of the State of Virginia, and a common carrier of goods and passengers for hire in the State of South Carolina, with legal capacity to sue and be sued, and now owns and

operates, and at the times mentioned in this complaint, did own and operate a line of railroad extending from Augusta, a city in the State of Georgia, through Edgefield county, and other counties in the State of South Carolina, to Columbia, a city in the county of Richland, in the State of South Carolina, and is now operating, and at the times mentioned in this complaint did operate, a line of railway from Aiken, a city in the county of Aiken, and in the State aforesaid, by Trenton, to Edgefield, a city in the county of Edgefield, in the State aforesaid, Trenton being a junctional point of the two said lines of railway; and the defendant now maintains offices and agents for the transaction of its business in the county of Edgefield, aforesaid.

2. That the plaintiff has been, during all of his life, except when temporarily absent, a resident and citizen of the county of Edgefield aforesaid, about ten miles west of the town of Edgefield aforesaid; and on June 18, 1913, the plaintiff was the owner of thirteen (13) cases of boots and shoes, which on said date were delivered to Seaboard Air Line Railway Company, at Petersburg, Virginia, to be transported to this plaintiff at Edgefield, South Carolina, and as said railway company has no line of railway extending to Edgefield, South Carolina, the said boots and shoes were delivered to and

3 received by the defendant to be transported and delivered safely to this plaintiff at Edgefield, South Carolina, for valuable consideration; and the defendant did transport the thirteen (13) cases of boots and shoes, the property of this plaintiff, to Edgefield, South Carolina, which said shipment arrived at Edgefield, S. C., on or about the 24th day of June, 1913, and was then and there of the value of three hundred seventy-two ($372.35) dollars and thirty-five cents, the invoice price of said boots and shoes being three hundred sixty-four ($364.60) dollars and sixty cents, and the freight charges seven ($7.75) dollars and seventy-five cents, aggregating said amount, and said freight charges were paid by the plaintiff to said defendant on the 24th day of June, 1913, at which time the plaintiff received four (4) cases of said boots and shoes, leaving nine (9) cases of said boots and shoes in the care and possession of the defendant as a common carrier, and the said nine (9) cases of boots and shoes left in the possession of the defendant were of the value then and there at Edgefield, South Carolina, of two hundred forty-one ($241.78) dollars and seventy-eight cents.

3. That the plaintiff is informed, believes, and alleges, that all of said boots and shoes, that is, the thirteen (13) cases, were delivered to the defendant in good order and condition, and were to be delivered to this plaintiff by the defendant in like good order and condition, but that instead of complying with its contract to so deliver the said boots and shoes in good order and condition to this plaintiff, the defendant has never delivered nine (9) cases of the said thirteen cases of boots and shoes to this plaintiff, and the plaintiff has never received the same, and has been notified by the defendant that they were destroyed by fire in its station at Edgefield, South Carolina, on the morning of July 4, 1913, and the defendant has failed and re-

fused to pay this plaintiff for the said nine (9) cases of boots
4 and shoes, aggregating in value the sum of two hundred forty-one ($241.78) dollars and seventy-eight cents, a claim for which amount was duly filed with the defendant within thirty days after the alleged destruction of the same by fire, but the defendant has failed and refused to pay the said claim, or any part thereof, and denies all liability therefor, and thereby the plaintiff has been damaged by the defendant in the sum of two hundred forty-one ($241.78) dollars and seventy-eight cents, which amount is due this plaintiff by the defendant on the implied contract of the defendant, as a common carrier, to transport and deliver the said cases of boots and shoes in good order and condition to this plaintiff as aforesaid.

For a Second Cause of Action.

4. That the plaintiff is informed, believes, and alleges, that the defendant, Southern Railway Company, is, and at the times mentioned in this complaint was, a corporation duly organized and incorporated under the laws of the State of Virginia, and a common carrier of goods and passengers for hire in the State of South Carolina, with legal capacity to sue and be sued, and now owns and operates, and at the times mentioned in this complaint did own and operate a line of railroad extending from Augusta, a city in the State of Georgia, through Edgefield county, and other counties in the State of South Carolina, to Columbia, a city in the county of Richland, in the State of South Carolina, and is now operating, and at the times mentioned in this complaint did operate, a line of railway from Aiken, a city in the county of Aiken, and in the State aforesaid, by Trenton, to Edgefield, a city in the county of Edgefield, in the State aforesaid.—Trenton being a junctional point of the two said lines of railway; and the defendant now maintains offices and agents for the transaction of its business in the county of Edgefield aforesaid.

5 5. That the plaintiff has been during all of his life, except when temporarily absent, a resident and citizen of the county of Edgefield aforesaid, about ten miles west of the town of Edgefield aforesaid; and on June 18, 1913, the plaintiff was the owner of thirteen (13) cases of boots and shoes, which on said date were delivered to Seaboard Air Line Railway Company, at Petersburg, Virginia, to be transported to this plaintiff at Edgefield, South Carolina, and as said railway company has no line of railway extending to Edgefield, South Carolina, the said boots and shoes were delivered to and received by the defendant to be transported and delivered safely to this plaintiff at Edgefield, South Carolina, for valuable consideration; and the defendant did transport the thirteen (13) cases of boots and shoes, the property of this plaintiff, to Edgefield, South Carolina, which shipment arrived at Edgefield, South Carolina, on or about the 24th day of June, 1913, and was then and there of the value of three hundred seventy-two ($372.35) dollars and thirty-five cents, the invoice price of said boots and shoes being three hundred and sixty-four ($364.60) dollars and sixty cents, and the freight

charges seven ($7.75) dollars and seventy-five cents, aggregating said amount, and the said freight charges were paid by the plaintiff to said defendant on the 24th day of June, 1913, at which time the plaintiff received four (4) cases of said boots and shoes, leaving nine cases of said boots and shoes in the care and possession of the defendants as a warehouseman, and the said nine cases of boots and shoes left in the possession of the defendant were of the value then and there at Edgefield, South Carolina, of two hundred forty-one ($241.78) dollars and seventy-eight cents.

6. That the plaintiff is informed, believes, and alleges, that all of said boots and shoes, that is the thirteen (13) cases, were delivered to the defendant in good order and condition, and were to be
6 delivered to this plaintiff by the defendant in like good order and condition, but that instead of complying with its contract to so deliver the said boots and shoes in good order and condition to this plaintiff, the defendant has never delivered nine (9) cases of the said thirteen cases of boots and shoes to this plaintiff, and the plaintiff has never received the same, and has been notified by the defendant that they were destroyed by fire in its station at Edgefield, South Carolina, on the morning of July 4, 1913, and the defendant has failed and refused to pay this plaintiff for the said nine cases of boots and shoes, aggregating in value the sum of two hundred forty-one ($241.78) dollars and seventy-eight cents, a claim for which amount was duly filed with the defendant within thirty days after the alleged destruction by fire, but the defendant has failed and refused to pay said claim, or any part thereof, and denies all liability therefor; and thereby plaintiff has been damaged in the sum of two hundred forty-one ($241.78) dollars and seventy-eight cents, and the defendant was charging the plaintiff warehouse fees for holding in possession and taking care of said nine cases of boots and shoes.

7. That the nine (9) cases of boots and shoes, so the plaintiff is informed, believes and alleges, were destroyed while in the warehouse of the defendant at Edgefield, South Carolina, on the morning of July 4, 1913, by the negligence of the defendant in: (*a*) allowing its warehouse and adjoining rooms to be infested with a great quantity of rats that had access to loose matches, and matches in boxes in said building, wherein was accumulated a quantity of paper in divers inflammable conditions, and other inflammable substances, such as cloth, sacks, oils, and liquors, and rats set the fire that destroyed the plaintiff's said nine (9) cases of boots and shoes; (*b*) storing lime in, and allowing loose lime to be on the floor of defendant's said warehouse,—lime being an inflammable substance, especially when coming in contact with moisture, in some way came in con-
7 tact with said lime, resulting in the fire which destroyed the plaintiff's nine (9) cases of boots and shoes aforesaid; (*c*) allowing corn, flour, meal, hay, and other freight to be so packed and accumulated in said warehouse as to produce spontaneous combustion, and therefrom the said fire was kindled which destroyed the plaintiff's said nine (9) cases of boots and shoes; (*d*) the agentts and servants of the defendant, acting in the scope of their duties, smoked cigarettes and cigars, and late in the evening preceding said

date threw the stumps into inflammable paper and other inflammable substance, and therefrom a fire was kindled, and smouldered and burned until the date aforesaid, when it destroyed the plaintiff's nine (9) cases of boots and shoes; (*e*) failing to supply said warehouse with a water sprinkler system, or other fire extinguishers, whereby said fire could have been extinguished before plaintiff's said nine (9) cases of boots and shoes were burned; (*f*) failing to have a night watchman at said warehouse, with keys to same, as the value of the property therein stored aggregated a large sum, and after the fire was discovered in the warehouse, if the doors could have been unfastened, plaintiff's said nine (9) cases of boots and shoes could and would have been recovered and saved; (*g*) having said warehouse so constructed that the doors to the same could not be unfastened or unlocked from the outside, and if they could have been, after the fire had been discovered, in the warehouse, the doors could have been unlocked, and the plaintiff's nine (9) cases of boots and shoes could and would have been recovered and saved from said fire.

8. That the negligence of the defendant and its agents and servants, acting in the scope of their duties, has damaged this plaintiff in the sum of two hundred forty-one ($241.78) dollars and seventy-eight cents.

8 For a Third Cause of Action.

9. That the plaintiff is informed, believes, and alleges, that the defendant, Southern Railway Company, is, and at the times mentioned in the complaint was, a corporation duly organized and incorporated under the laws of the State of Virginia, and a common carrier of goods and passengers for hire in the State of South Carolina, with legal capacity to sue and be sued, and now owns and operates, and at the times mentioned in this complaint did own and operate, a line of railroad extending from Augusta, a city in the State of Georgia, through Edgefield county, and other counties in the State of South Carolina, to Columbia, a city in the county of Richland, in the State of South Carolina, and is now operating, and at the times mentioned in this complaint did operate, a line of railway from Aiken, a city in the county of Aiken, and in the State aforesaid, by Trenton, to Edgefield, a city in the county of Edgefield, in the State aforesaid,—Trenton being a junctional point of the two said lines of railway; and the defendant now maintains offices and agents for the transaction of its business in the county of Edgefield aforesaid.

10. That the plaintiff has been during all of his life, except when temporarily absent, a resident and citizen of the county of Edgefield aforesaid, about ten miles west of the town of Edgefield aforesaid; and on June 18, 1913, the plaintiff was the owner of thirteen (13) cases of boots and shoes, which on said date were delivered to Seaboard Air Line Railway Company, at Petersburg, Virginia, to be transported to this plaintiff at Edgefield, South Carolina, and as said railway company has no line of railway extending to Edgefield, South Carolina, the said boots and shoes were delivered to and received by the defendant to be transported and delivered safely to

this plaintiff at Edgefield, South Carolina, for valuable con-
9 sideration: and the defendant did transport the thirteen (13) cases of boots and shoes, the property of this plaintiff, to Edgefield, South Carolina, which shipment arrived at Edgefield, South Carolina, on or about the 24th day of June, 1913, and was then and there of the value of three hundred and seventy-two ($372.35) dollars and thirty-five cents, the invoice price of said boots and shoes being three hundred and sixty-four ($364.60) dollars and sixty cents, and the freight charges seven ($7.75) dollars and seventy-five cents, aggregating said amount, and the said freight charges were paid by the plaintiff to said defendant on the 24th day of June, 1913, at which time the plaintiff received four (4) cases of said boots and shoes, leaving nine (9) cases of said boots and shoes in the care and possession of the defendant as warehouseman, and the said nine (9) cases of boots and shoes left in the possession of the defendant were of the value then and there at Edgefield, South Carolina, of two hundred forty-one ($241.78) dollars and seventy-eight cents.

11. That the plaintiff is informed, believes, and alleges, that all of said boots and shoes, that is, the thirteen (13) cases aforesaid, were delivered to the defendant in good order and condition, but that thereafter the defendant, and its agents, acting in the scope of their duties, mismanaged nine (9) cases of said boots and shoes, and negligently caused a fire, which destroyed the said nine (9) cases in its warehouse at Edgefield, South Carolina, then and there the property of this plaintiff, and of the value of two hundred forty-one ($241.78) dollars and seventy-eight cents, which fire occurred on the morning of July 4, 1913, resulting in a total loss to this plaintiff of the said nine (9) cases of boots and shoes, and thereby damaged this plaintiff in the sum aforesaid,—two hundred forty-one ($241.78) dollars and seventy-eight cents.

12. That on July 31, 1913, within thirty days after the loss and destruction by fire of the said nine (9) cases of boots
10 and shoes, this plaintiff filed with an agent of the defendant at point of destination of such shipment a claim for the sum of two hundred forty-one ($241.78) dollars and seventy-eight cents, and on August 11, 1913, the defendant gave notice to this plaintiff that it could not and would not pay said claim, and failed to adjust and pay said loss and damage as provided by law, and a cause of action accrued to this plaintiff for a penalty in the sum of fifty ($50) dollars for the failure on the part of the defendant to adjust and pay said loss and damage as provided by law after the claim was filed for the said two hundred forty-one ($241.78) dollars and seventy-eight cents as aforesaid.

Wherefore, the plaintiff demands judgment against the defendant:

1st. For the sum of two hundred forty-one ($241.78) dollars and seventy-eight cents, with interest from July 31, 1913.

2d. For the penalty of fifty ($50) dollars.

3d. For the costs and disbursements of this action.

J. WM. THURMOND,
Plaintiff's Attorney.

(Verified.)

Complaint served August 27, 1913.

Answer.

The answer of the above named defendant *respectively* shows unto the Court:

1st. That the defendant admits the allegation of paragraph one of the first cause of action as set out in the complaint, and also admits the allegation of paragraph four as set out in the second cause of action in the complaint, and the allegation of paragraph nine as set out in the third cause of action of the complaint.

2d. That the defendant denies each and every other allegation of the complaint as set out in the first, second and third causes of action, and demands proof of the same.

11 3d. This defendant alleges, that on the morning of the 4th day of July, 1913, the depot and warehouse of this defendant at Edgefield, S. C., was destroyed by fire and all of the contents of said depot and warehouse were consumed by said fire. That the origin of said fire is unknown to this defendant. That all of the records of said defendant were destroyed by said fire and the defendant is unable to say what freight was destroyed. That the fire was not caused by any neglect of this defendant, or any of its agents or servants. That if the plaintiff lost any freight by the burning of said depot and warehouse the same had been in said warehouse for more than ten days after the plaintiff had notice that the freight had arrived, and that said loss was caused by the negligence of the plaintiff in not removing his freight in a reasonable time after he had notice of its arrival at Edgefield, and that the same had been stored in the warehouse of this defendant.

4th. That the defendant, Southern Railway Company, is a railroad company engaged in interstate commerce within the provision of the Act of Congress to regulate commerce and the amendments and supplements thereto controlling and governing interstate railroads and interstate shipment of freight over such railroads. That the shipment of the specific freight described and set out in the complaint and consigned to the plaintiff was an interstate shipment, the same being shipped from Lynchburg, Virginia, to Edgefield, South Carolina, and, therefore, must be governed and controlled by the Act of Congress of 1887, and the various amendments and *sp*pplements thereto.

Wherefore, this defendant asks that the complaint be dismissed with costs.

N. G. EVANS,
Defendant's Attorney.

12 *Testimony.*

By agreement of counsel the testimony of E. W. Samuels, M. W. Padgett, and Jesse W. Dorn, given at a former trial of this case, was used in this case and read to the jury.

E. W. SAMUELS (white), sworn:

Direct examination.

By Mr. Thurmond:

Q. You live around town here?
A. Yes, sir.
Q. Were you acquainted with the depot of the Southern Railway?
A. Yes, sir.
Q. Do you know how the doors were constructed?
A. Yes, sir.
Q. How did they open, from the outside or inside?
A. From the inside.
Q. Could you get in from the outside without bursting them down?
A. I do not think so.
Q. How would you get to the depot in order to open it?
A. Through the office.
Q. How many doors in the office?
A. I think there is one door in the office.
Q. Have you had occasion to be there very much?
A. Yes, sir; I was down there most every day.
Q. State to the jury whether or not you saw much trash in the depot in any of the corners?
A. There was a lot of freight there most of the time, but in one corner they kept a lot of stuff that seemed to be turned down or they had no bills for it, a good deal of trash.
Q. Which corner?
A. In the left-hand corner of the depot.
Q. There was a big lot of trash there?
A. I guess you might call it trash; a lot of freight.
Q. Was it stuff that would catch fire easily?
A. I shou-d think so.
13 Q. Did you know anything about the partition between the office and the depot, whether there was a certain place where they kept papers or not?
A. I think there was.

Mr. Evans: If you don't know it, don't say it.

A. There was a wardrobe or something like that that they kept papers in setting right there by the door.

(By Mr. Thurmond:)

Q. Had you ever seen matches in there?
A. Not in that corner.
Q. In the warehouse?
A. I cannot say.
Q. Have you ever had any experience with rats and matches? Do you know whether they will strike matches or not?
A. I never have had any experience on that line; but I have heard that they do.

Q. Do you think that it is a reasonably safe place to keep freight without a hose or water system or any night watchman, with no way to get in the depot except by bursting down the doors from the outside or go through the office?

Mr. Evans: We object.

A. I think no way to get into the depot is not safe.

(By Mr. Thurmond:)

Q. Don't you think a sprinkler system like the Adams warehouse has would promote the safety very much?
A. I think so.
Q. Do you think it is reasonably safe without any hose to turn on there, and don't you think that that would promote the safety very much?
A. I think so.
Q. Knowing that depot as you did, I wish you would explain to the jury with it locked back and front, how you could use water from the outside with a bucket; can you explain to the jury how that could be done?
A. I do not see how it could be done.

Cross-examination.

By Mr. Evans

Q. You have been to several fires in Edgefield?
A. Yes, sir.
14 Q. And you have seen houses torn down and doors bursted open?
A. Yes, sir.
Q. And you have seen water drawn out of wells?
A. Yes, sir.
Q. Would you not consider those barrels of water a more safe thing than drawing it out of wells and throwing it on the fire, with the barrel filled with water?
A. Generally you can get into a dwelling.
Q. You can break a door if no other way?
A. Yes, sir.
Q. You have seen a lot of depots; was not that depot as good and as safe a depot as you have even seen, except a brick depot?

Mr. Thurmond We object.

Mr. Evans: The question is if it was not as safe a depot as he had ever seen.

Mr. Thurmond: That is not the question; the question is about this depot; he might have seen some other depot that was not reasonably safe.

Mr. Evans: He has expressed an opinion as to what would promote safety, and I want to ask him if it was not as safe as any he had ever seen.

The Court: I think he can do that.

(By Mr. Evans:)

Q. Was it or not. Was it not a new depot?
A. Yes, sir; it was a new depot.
Q. And had been freshly painted?
A. I do not recollect about that; I think they painted it pretty often.
Q. Was it not as safe as any depot you ever saw except a brick depot?
A. It was a good clean depot with the exception of a lot of freight.
Q. It was clean except that?
A. Yes, sir.
Q. And people have to get their freight out of there?
A. Yes, sir.
Q. The freight that you saw there was in the corner that you said was trash? You mean freight in boxes and bags what they call old hoss freight?
A. There was a lot of freight in that corner.
Q. It was freight?
A. Yes, sir.
Q. Those doors were sliding doors?
A. Yes, sir.
Q. You have seen freight warehouses?
A. A good many.
Q. Did you ever see a door open back in a warehouse like this one here (indicating)?
A. I do not recollect.
Q. Don't you think they all slide?
A. I rather think so.
Q. And those were sliding doors?
A. Yes, sir.
Q. Those doors were how wide?
A. About ten feet.
Q. They are double doors, and if you had to swing them back this way in the warehouse it would take up five or six feet on each side of the doors in the warehouse?
A. Yes, sir.
Q. And they are built sliding to allow more room?
A. I think so.
Q. This town has no general water plant, has it?
A. No, sir.
Q. The only water plants in town are the factory and the Adams warehouse?
A. Yes, sir; and the small one out here.
Q. They run a pipe from the mill to the Adams warehouse?
A. Yes, sir; Mr. Adams did.
Q. That is for the protection of the Adams warehouse?
A. I suppose so.
Q. Do you know when the depot was burned?
A. Yes, sir.
Q. Were you there?
A. I got there about the time it fell in.

Q. You do not know what part caught first; which part fell in first?

A. The depot had all fallen in; the front of the office was standing when I got there.

Q. The front of the office on Main street?

A. Yes, sir.

Q. Is the depot in a respectable part of town?

A. Yes, sir.

16 Q. It was in a public, respectable part of the town?

A. Yes, sir.

Q. It was on the main street of the town, was it not?

A. Yes, sir.

Q. Did you or not ever see those barrels of water sitting on the platform?

A. Yes, sir; I have seen water there.

Q. And the barrels full of water?

A. I think so.

Q. Do you know Mr. Townsend?

A. Yes, sir.

Q. Did you ever seen him smoke a cigarette?

A. I don't think so.

Q. Did you ever see Miss Richardson, the young lady who works there, smoke?

A. No, sir.

Q. Did you ever see T. L. Timmerman smoke a cigarette?

A. I do not recall.

Q. You never saw anyone smoke a cigarette in that office?

A. No, sir; I never noticed that.

(By Mr. Thurmond:)

Q. There is no reason why sliding doors could not be constructed and locked from the outside?

A. I think they could be locked from the outside.

Q. As well as from the inside?

A. Yes, sir.

JESSE W. DORN (white), sworn:

Direct examination.

By Mr. Thurmond:

Q. Have you been about the depot down here a good deal?

A. Yes, sir; a right smart.

Q. You had occasion to haul freight out of the depot for the merchants?

A. Yes, sir.

Q. I wish you would state to the jury whether there was any paper much in the depot?

A. They kept some between the depot and the office; they kept the paper where they kept old papers?

Q. Many?

A. A right smart.
Q. Between the depot and office?
A. Yes, sir.
17 Q. What sort of paper?
A. I thought they were old bills of lading and things they used.
Q. Many of them kept in there?
A. A right smart.
Q. Between the two rooms?
A. Yes, sir.
Q. What other sort of papers were there?
A. I could not say.
Q. You just saw a lot of papers there?
A. The papers they kept there.
Q. Did you notice any lime on the outside of the depot or around there at any time?
A. I have seen lime there occasionally just in there and on the outside.
Q. Did you ever see any rats in there?
A. I have seen a good many rats there.
Q. Large rats?
A. Right smart size.
Q. Did you ever see any matches in the depot?
A. Yes, sir: I have seen matches there.
Q. What is the result if rats and matches get together in inflammable paper?
A. I have always heard that rats loved matches.
Q. Will they set fire to anything?
A. I suppose some of them would strike.
Q. Did you notice in one of the corners of the depot if there was a lot of stuff piled?
A. No, sir: I do not remember anything about that: of course in the corners there was stuff, but I supposed it was freight, or something they had had over a good while.
Q. What is the effect if lime is taken into a house if it gets wet?
A. If it is not slacked lime, I do not know.
Q. Do you know whether it will produce fire or not?
A. I have never tried it myself.
Q. Do you know the effect of water on lime?
A. No, sir.
Q. Was there any way to extinguish a fire in the depot with water?
A. Not that I know of.
Q. Did you ever see a hose there?
A. No, sir.
Q. No hose to use in turning water on?
A. No, sir.
18 Q. Did you have a night watchman there?
A. Not that I know of.
Q. How were those doors constructed: could you get into the depot from the outside except going through the office?
A. I think not.

Q. Did you have to go through the office?
A. I always thought you had to go through the office; they were sliding doors and fastened on the inside.
Q. Did you ever notice much hay around the depot?
A. Yes, sir; I have seen hay there.
Q. Flour, and a lot of other freight inside of the depot?
A. Yes, sir.
Q. Did you go to the fire that morning?
A. Yes, sir; but I was late in getting there; I discovered the fire, and I hitched up my horse before I went, and it was all burned when I got there.

Cross-examination.

By Mr. Evans:

Q. That depot was located in a quite respectable part of the town?
A. Yes, sir.
Q. On Main street?
A. Yes, sir.
Q. In a public place?
A. Yes, sir.
Q. What was the condition of that depot on the 3d of July?
A. I think it was good.
Q. Good?
A. Yes, sir.
Q. What was that depot made for?
A. Made to keep goods in.
Q. To keep freight in?
A. Yes, sir.
Q. And you have seen all sorts of freight in cars or unloaded?
A. Yes, sir.
Q. And you have hauled freight out of that depot every day?
A. Yes, sir.
Q. And there was freight there all the time?
A. Yes, sir.
Q. And there were barrels of water sitting on the platform?
A. Yes, sir.
19 Q. And buckets hanging over them?
A. Yes, sir.
Q. The papers that you speak of—did you ever go into Mr. Thurmond's office?
A. Yes, sir; and yours, too (laughter).
Q. And you have seen the pigeon holes where they keep their papers?
A. Yes, sir.
Q. And that is what the railroad had?
A. In a case.
Q. A case where they kept their blanks and supplies and writing paper?
A. And old papers.
Q. They filed their papers there in those pigeon holes?

A. Yes, sir.
Q. It was not loose paper throwing around on the floor?
A. I don't know that I saw any.
Q. You have seen several depots?
A. Yes, sir.
Q. How did this one compare with others except the brick ones?
A. I thought this was very good.
Q. Was not this a good depot?
A. Yes, sir.
Q. Freshly painted?
A. Yes, sir.
Q. Did you ever see any warehouse doors open in any other way except the way that these opened?
A. Always opened and slid.
Q. Was that not a safe way to keep people from getting in there?
A. I suppose so.
Q. You mean to say that the warehouse and the depot that it was connected with the depot, and the agent in opening up could open the door to his office, and go in there that way?
A. Yes, sir.
Q. And he would open the door between his office and the depot, and then unlock and shove back these doors?
A. Yes, sir.
Q. How wide was the space to those doors?
A. I suppose eight or ten feet.
Q. How many doors were there in the depot?
A. Three, I think.
Q. One on the side next to Adams' warehouse, one on the end, and one on the other side?
A. Yes, sir.
Q. And one leading into the office?
A. Yes, sir.
Q. Don't you think that was the best way to secure those doors?
A. I don't know; I guess it was as good as any.
Q. Don't you know it was a safer way than to put a staple on the facing and a hasp on that; and don't you know that by fastening them on the inside it is safer?
A. Yes, sir; that would be safer.
Q. Did you ever see Mr. Townsend smoke a cigarette?
A. No, sir.
Q. Or T. L. Timmerman?
A. No, sir.
Q. Or Miss Richardson?
A. I don't think she smokes.
Q. There were only three people working in that depot; they were the only ones there on the 3d day of July?
A. Yes, sir.
Q. Mr. Townsend, Mr. Timmerman, and this young lady, and you never saw a single one of them smoke a cigarette?
A. Not that I know of.

(By Mr. Thurmond:)

Q. State to *that* jury whether or not a lot of the stuff in that depot could have been removed more quickly if there was a lock that could have been unlocked from the outside?

A. I think it could if you could have gotten in from the outside.

Q. And would not the safety of the depot have been very much promoted?

A. In a case of fire.

Q. Could you not have a lock to sliding doors without having a hasp on the outside; could you not have it made in the door?

A. Yes, sir; you could have it locked.

Q. State to the jury whether or not you think a hose with some water to get at from the outside would promote the safety of the depot?

A. Yes, sir; I think it would have been.

Mr. Evans: I think my friend has gone far enough; that is not negligence; a sprinkler system is not a hose system.

21 Mr. Thurmond: This covers it.

The Court: I think that covers it.

(By Mr. Thurmond:)

Q. Don't you think a hose would have promoted the safety of the depot?

A. I think it would have been better.

Q. Is there not a little sprinkler that puts out a fire that you can use on fire with some kind of acid?

A. Yes, sir; I have seen them.

Q. Have you not seen them that you could put out fires well?

A. I could not say that.

Q. They are convenient?

A. Yes, sir.

(By Mr. Evans:)

Q. Is that any more convenient than a barrel *or* water with a bucket?

A. I don't know.

Q. Which had you rather have to fight a fire with?

A. As for my part, I had rather have a bucket to use; as I would not know how to use the other.

Q. Has this town any water system?

A. I think not, except at the mill.

Q. There is no hydrant from the public square to the depot?

A. No, sir.

Q. Nor near the depot?

A. No, sir.

Q. There was no water there if they had had a hose there?

A. No, sir.

Q. There is no water there?

A. No, sir.

(By Mr. Thurmond:)

Q. Will you state if any one could go in there with a fire on the inside?

A. I was not there, and I do not know whether the office caught first; I do not think so if the office caught first.

Q. There was no way to get in if the office caught first, unless you broke down the doors?

A. No, sir.

Q. And the buckets of water on the outside would not do any good?

A. Not if the fire was on the inside.

Q. This fire was on the inside?

A. I guess it was.

Q. What good would water in barrels on the outside do if
22 the fire was on the inside?

A. I don't think it would do much.

(By Mr. Evans:)

Q. You don't stop to unlock doors when you go to fight fire?

A. No, sir.

Q. You knock them down?

A. Yes, sir.

Q. And then the barrels and buckets of water would have come in?

A. Yes, sir.

Q. If you had those barrels of water on the inside they would be worthless; they would have been no good at all?

A. No, sir.

(By Mr. Thurmond:)

Q. If you had a hose, and could open the door, you could stand there and shoot water in there when you could not go in there for the smoke at all?

A. Yes, sir.

M. W. PADGETT (white), sworn:

Direct examination.

By Mr. Thurmond:

Q. Have you even been around that depot much before it was burned?

A. I would go there sometimes.

Q. Did you ever notice any trash in there?

A. Yes, sir; there was a little trash in one corner; I don't know what it was, but there was something piled up in a corner.

Q. You noticed trash in one corner?

A. Trash and paper, but I could not tell you whether it was freight or trash.

Q. A lot of stuff piled up there?

A. Yes, sir.

Q. And paper in it?

A. As good as I could tell you there was paper; I could not tell you positively that it was paper.
Q. Did you ever see any lime around there?
A. On the platform.
Q. You have seen plenty of lime there?
A. I don't know whether there was plenty.
23 Q. Did you ever see any rats there?
A. Yes, sir; I have seen some rats there.
Q. Do you know whether they had a night watchman there?
A. I don't know about that; I have not seen one.
Q. Did you ever see a water sprinkler system down there?
A. No, sir.
Q. Did you ever see a hose to shoot water on anything?
A. No, sir.
Q. State to that jury whether there was any means at all of shooting water on that fire?
A. Not any that I know of.
Q. In the way of a hose?
A. No, sir.
Q. Was there anything except the water in the barrels on the platform?
A. No, sir; I never saw any.
Q. Do you know what generally happens when loose matches and rats get together?
A. I have heard that rats would strike matches.

Cross-examination.

By Mr. Evans:

Q. Do you mean to say that there was a pile of freight piled up in the corner?
A. I don't know what it was.
Q. It was not trash?
A. Some paper or something in the corner.
Q. Barrels and boxes and that paper hanging in there on the wall?
A. Yes, sir; those papers hung on the wall.
Q. And there were papers there in a bookcase?
A. Yes, sir.
Q. Pigeon holes?
A. Yes, sir.
Q. And that was all the paper that you saw in the depot?
A. I never took up any time with it.
Q. That was all the paper that you saw in there?
A. Yes, sir; that was all I saw.
Q. You were the first one that got there?
A. I was at the store; I was in the store when they hollered fire.
Q. What time of day was it?
A. About sunup.
24 Q. Just about sunup?
A. Yes, sir; I guess so.
Q. How far is your store from the depot?

A. I guess about thirty steps.
Q. You were in Mr. Ed Johnston's store?
A. Yes, sir.
Q. And you were among the first that got there?
A. I did not get out to the fire at all; I had to stay in the store.
Q. You did not shut up your store and go?
A. No, sir; they all left the store that was in there and went to the fire, and I stayed in there.
Q. Who was in there beside you?
A. There was not anyone in there at the time the alarm was given, but a negro was in front of the store.
Q. There was no one in the store but you?
A. No, sir.
Q. You have seen that depot?
A. Yes, sir.
Q. What condition was it in on the 3d of July?
A. It seemed to be all right.
Q. In as good condition as any depot?
A. It seemed to be.
Q. There is no hose water system in this town?
A. Except at the mill.
Q. And that is for the protection of the mill alone?
A. Yes, sir.
Q. You mean the factory over there?
A. Yes, sir.
Q. They have got a water system of their own?
A. Yes, sir.
Q. They pump the water out of Beaverdam?
A. Yes, sir.
Q. And there is no water hose in the town by which you could squirt water on a fire?
A. I have not seen any.
Q. You have been here long enough to know?
A. Yes, sir.
Q. Have you seen one here?
A. No, sir.
Q. Did you ever see those barrels of water with buckets
25 hanging over them down there at the depot?
A. Yes, sir; I saw two barrels.
Q. Full of water?
—. I do not remember seeing any buckets; I saw the barrels.
Q. They have no system in this town for the protection of dwelling houses against fire?
A. No, sir; if there is, I don't know it.
Q. Did you ever see any matches there?
A. There were cartons of matches there.
Q. That came by freight?
A. Yes, sir.
Q. Are you certain they were there the week before?
A. It was when I was in there.
Q. And that might have been ten days before the fire?

A. Yes, sir.
Q. You cannot say that there was a match in there at the time of the fire?
A. No, sir.
Q. Or the day before the fire?
A. No, sir; I could not say.
Q. Was not that depot kept pretty clean?
A. Some times it was all right, and again it would be filled up a right smart; there was a lot of freight there at times.
Q. But the depot was swept out?
A. Yes, sir.
Q. It was kept as clean as any store or depot could be kept?
A. Yes, sir; it was kept pretty clean, I think.
Q. Did you ever see Mr. Townsend smoke cigarettes?
A. No, sir.
Q. Or Miss Richardson?
A. No, sir.
Q. Or T. L. Timmerman?
A. No, sir.
Q. They are the only three people that worked in that depot?
A. Yes, sir.

26 M. C. JACKSON (white), sworn:

Direct examination.

By Mr. Thurmond:

Q. How far did you live from the depot down here on the 4th of July of last year?
A. About 120 or 125 yards.
Q. Do you recall the fire on the morning of the 4th of July?
A. Yes, sir.
Q. Did you go to it?
A. Yes, sir.
Q. State to the jury the size of the fire when you got there.
A. I did not see any fire when I got there; I just saw smoke.
Q. What did you see next?
A. Some time after we got there the fire broke out at the top, a blaze as big as two fingers; just a little bit of smoke.
Q. Did you see any ladder there?
A. No, sir.
Q. If they had had a ladder there could they have put that fire out?
A. I could have put two boys up there and it looks like I could.
Q. There was no way to get on top of it?
A. No, sir.
Q. If you could have gotten in the room there, in the warehouse, if those doors could have been opened from the outside, could the property inside, or a lot of stuff, could that not have been saved?

Mr. Evans: That is leading.

(By Mr. Thurmond:)

Q. Such as shoes, could they or not have been saved?

A. Yes, sir; I think so.

Q. As a matter of fact the doors could not be opened from the outside; is that true?

A. No, sir.

Q. What was the only way to get into that depot when it was fastened up? How did you have to enter?

A. Had to go in through the front, through office, and go through a little door and move the sliding doors.

Q. How many doors did that warehouse have in front of
27 the main warehouse?

A. It had two waiting rooms and one office.

Q. The one was between the waiting room and warehouse?

A. Yes, sir.

Q. Now, explain to the jury how you could get into the warehouse when it was fastened?

A. The way we went in we went in by the side of the waiting room and went into the office and went through a little door about three feet wide that went in from the office.

Q. A right narrow door?

A. Yes, sir; I would say three feet.

Q. Where was the door with reference to the partition between the office and warehouse?

A. The door went this way, on the side here; it was half way between the end of the chimneys on each side and where they join at the top a little coming through here not far from the chimney; I would say five or six feet from the chimney.

Q. That was near the partition?

A. Yes, sir.

Q. With a fire in there at that partition, near that door, could you pass from there to get into the main part in there?

A. I would not say so.

Q. You could not pass in there because of fire in the partition?

A. No, sir.

Q. How many doors did that warehouse have to it?

A. I think it was five; I would not be sure about it. I think there were two on this side and two on the other side, and one at the end.

Q. You are not sure about that?

A. No, sir; but I think it is five.

Q. Could those doors be opened at that time, or were they opened?

A. I saw one fly open; after we got a whole crowd there we toted off two buggies, and I saw one give way, the one next to my house, I saw it weaken and the fire flew out.

28 Q. That was after it was burning up?

A. Yes, sir; three-quarters of an hour.

Q. There was no way to get in from the outside because there was fire near the partition?

A. I don't see how you could to save your life.

Q. That was how high a house; how many feet of ladder would it have taken to have put anyone on top of that house?

A. I suppose we could have gone on there if we had had a sixteen-foot ladder, but it would have taken that much more to get on it, I would say about thirty feet, where I saw the smoke.

Cross-examination.

By Mr. Evans:

Q. You did not know anything about this case the last time it was tried?

A. I did not know it was tried before.

Q. You did not know it

A. No, sir.

Q. And you have been living in town?

A. Yes, sir.

Q. In the same place?

A. Yes, sir.

Q. And you knew nothing about it the time it was tried before; you never heard of it?

A. I heard it some time ago.

Q. When was the first time you ever told anyone this story that you have told here?

A. I never said anything until Sunday evening; a railroad man was sitting in the train Sunday night.

Q. Who was it?

A. I cannot call his name.

Q. Mr. McGee?

A. I do not know.

Q. Mr. Arthur?

A. I do not know his name.

Q. How do you know he was a railroad man?

A. He told me so.

Q. Where was that?

A. Sunday night at Johnston.

Q. When did you tell Mr. Thurmond about it; you said this was on Sunday; when did you tell him about it?

A. I never have told Will Thurmond about it.

29 Q. You never told him? When did you tell Dr. Prescott?

A. Not in my life.

Q. Or Wallace Prescott?

A. Not in my life.

Q. And you never told anyone until Sunday on the train?

A. I never knew anything about it myself.

Q. Don't you know that when you got to the fire that the whole inside of that depot was on fire?

A. It did not look so to me from what I saw.

Q. You saw the fire burst out from where?

A. Coming through the top, a little place about that big.

Q. You know that house was covered with tin?

A. Yes, sir.

Q. And the fire had bursted through the wood?
A. A little place about that big.
Q. Suppose the wareroom had been on fire, could you have gotten anything out that was on the inside?
A. I was not in there; I could not tell you.
Q. You did not dare go in there?
A. No, sir; and I was not going in there.
Q. You could not have gone in there?
A. We saved three buggies.
Q. You say it would have taken a 16-foot ladder to go up to where you saw that blaze?
A. Yes, sir.
Q. And you say it would have taken sixteen feet more to go to the fire?
A. Yes, sir.
Q. You wanted two ladders to get to it?
A. I would say it would take about thirty feet.
Q. You know that was a flat roofed house and a man could run all over it; could he not have gone to the comb of that house without a ladder; how would you have made a ladder stay if it was that steep?
A. I have nothing to do with that; you could have fastened one in the ground and stuck the other one up there.
Q. How could you handle the other part?
A. I said I never had anything to do with that.
Q. Could you have done it?
A. Being crippled as I am it would have been foolish.
Q. Could a stout man?
A. Yes, sir; a young man could.
Q. Run up on the roof?
A. Yes, sir; got a ladder and got up on there.
Q. How long since you came back to Edgefield?
A. Last October.
Q. Why did you leave here?
A. *I* George, I don't know whether that is any of your business.
Q. It may be some of the jury would like to know; were you indicted for anything?
A. No, sir; not a bit.
Q. What did you leave for?
A. George——
Q. Did they not catch you and fine you and you run off?
A. Not a bit.
Q. Tell us why you left?
A. I became dissatisfied.
Q. With what?
A. None of your business.
Q. Became dissatisfied with what?
A. None of your business.
Q. The way the town was treating you?
A. No, sir.
Q. What was it?

A. I have told you.
Q. Were you run away?
A. No, sir; I paid every dollar before I left here.
Q. You had to go?
A. I did not have to go anywhere.
Q. Why did you go.
A. To satisfy myself.
Q. You got satisfied and came back?
A. Yes, sir.
Q. When did you come back?
A. I came back on the 11th day of last October.
Q. How many times have you been convicted in Court?
A. Never was in Court.
Q. Were you not convicted for selling liquor?
A. No, sir.
Q. And paid a fine for selling liquor?
A. No, sir.
Q. Did you not pay a fine before Judge Brunson for selling liquor?

Mr. Thurmond: That is not the way to attack his reputation.
The Court: If he answers no, that settles it.
Mr. Evans: He can answer it if he sees fit.

Q. How many people were at the fire when you got there?
A. It was between four and five o'clock, and Mr. Ed Johnson had a little old dog that was mad-dog bit, and I wanted to kill the thing for fear it would bite some children.
Q. How many people were at the fire?
A. There was no one when I got there but Glover Lowe and Mrs. Pruitt's little boy.
Q. Who is Glover Lowe?
A. Hiram Lowe's son.
Q. How old is he?
A. I suppose he is fifteen or sixteen years.
Q. How old was the other boy?
A. About the same size.
Q. Where are they?
A. They were in the mill when they sent after me.
Q. Pick Pruitt and Glover Lowe?
A. I told them to run and holler fire.
Q. They went with you?
A. Yes, sir; and I told them to holler fire.
Q. And they yelled fire?
A. Yes, sir.
Q. What did you set out of the depot?
A. That was on the back side; we carried three buggies and put them next to the oil tank.
Q. You saw those barrels of water setting there full of water?
A. I found some gasoline setting there, and I was afraid it was going to burst open.
Q. There was gasoline there?

A. They told me so.
Q. You do not mean to tell us that when you left there there was gasoline in that house?
A. I was told so.
Q. Did you hear any burst?
A. No, sir.
32 Q. Was the gasoline in barrels?
A. It all poured out before the fire.
Q. Who told you to tell that story?
A. No one.
Q. Did you pour that gasoline around there?
A. No, sir.
Q. You never saw it in your life?
A. No, sir.
Q. Was M. W. Padgett there when you got there?
A. That door was locked when I went there; if so, he shut the door behind him and went inside.
Q. He did not come to the fire?
A. After a while.
Q. He came to the fire?
A. After a while.
Q. And what he says is not true; he says he did not go to the fire. Now tell us where you saw him?
A. I saw him standing on the street at the gasoline tank, where we put the three buggies, to keep it from bursting.
Q. You know this tank is clean across the street; why did you say it was at the fire?
A. I was asked to help do that.
Q. Did you ever see him at that fire?
A. Which Padgett?
Q. Where was he?
A. I do not know.
Q. Was he or not standing at Ed Johnson's store?
A. He was standing in the street when I saw him. In front of the door at the gasoline tank.
Q. Across from the depot?
A. Yes, sir.
Q. The street that goes to Trenton?
A. Yes, sir.
Q. And he was nearly on Main street?
A. It was right in front of the door at the oil tank.
Q. And that tank belonged to Ed Johnson?
A. Yes, sir; it did at that time.
Q. And you say that gasoline was Ed Johnson's?
A. No, sir; I said a barrel on the platform that I was told it was gasoline.
Q. I want to know what you know; did you see any gasoline there?
A. Not to my knowledge.
33 Q. Why did you say that; you knew there was none there?
A. That is what I was told.

Q. And you are willing to tell anything?

A. I believe if I was you I would go straight; see if I have not gone straight.

Q. You know nothing about this case?

A. No, sir; before God.

Q. And you were not summoned before in your life in this matter?

A. No, sir; never. I never knew anything about it until two weeks ago.

Q. And you never told anyone what you knew about it before you got on the stand, except a railroad man?

A. I had no talk with Mr. Thurmond, and no talk with Dr. Prescott, and no talk with Wallace Prescott.

Q. Who did you talk to?

A. Last Sunday evening we were at Johnston, and me and some boys got to talking about the case; I said what about it; he said what about it; he said, I do not know myself, and that is all I had to say.

Q. That is all you ever said?

A. Yes, sir.

Q. And you have never opened your mouth about it?

A. I never knew anything about it until a few days ago. I did not know there was any case at all.

Q. You helped put out the cars?

A. Yes, sir; and helped draw water.

Q. Where did you get the water?

A. Out of my own well.

Q. How far is your house from where the fire was?

A. From where we are to the water tank.

Q. How far is the house from where you drew water?

A. About 120 yards.

Q. Down the railroad track?

A. Right square across there.

Q. Don't you know that that coach was put out by water out of those barrels?

A. If you drew 25 or 30 buckets.

34 Q. And you put it in the barrels?

A. We toted it in buckets.

Q. You used what was in the barrels?

A. Yes, sir; at first; and it did not put it out.

Q. And they helped to put the fire out?

A. They helped to put out the passenger coach after we run them down the railroad; it was too soon to have the engine fired up and we pushed them off.

Q. And that was when you drew the water?

A. I helped draw water.

Q. And that is when you drew it, when you pushed them off, but you used the water at the depot?

A. I could not tell you, I guess by that time we had a hundred people there; I could not tell who helped.

Q. Don't you know that that depot caught in the warehouse?

A. I don't know it.

Q. Don't you know the office and waiting rooms were the last thing that caught?

A. All I saw is what I have told you.

Q. That was at the far end of the warehouse?

A. No, sir; the middle room between the warehouse and waiting rooms.

Q. Where was the chimney; was it not the center of the warehouse?

A. No chimney in the warehouse at all.

Q. All on the inside?

A. Yes, sir.

Q. You are as certain of that as you are about everything else that you have testified?

A. In the office.

Q. The chimney was not in the office?

A. Yes, sir.

Q. You know there was not anything but a partition between the warehouse and office?

A. The chimney was there, all right.

Q. Was not the chimney inside of the warehouse and not inside of the office?

A. It was right where they joined together.

35 Q. Right where they joined together?

A. I do not believe they had any fireplace inside of the warehouse.

Q. What was the warehouse used for?

A. For groceries and everything shipped there.

Q. Did you go there pretty often?

A. I had not been in there for two months before. I was over on the farm and not up here.

Q. You do not know what was in there and do not know how it caught?

A. No, sir.

Q. When you got there you could not do anything to save the building, could you?

A. It looks like if we could have got help we could have done a lot.

Q. Was it not early in the morning?

A. Between four and five o'clock.

Q. Between daylight and sunup?

A. Yes, sir.

Q. No one was up at that hour except the watchman?

A. It was the 4th of July and every one was asleep.

Q. It was the 4th of July and they were all out of the mill that day?

A. Yes, sir.

Q. With no facilities in this town—there is no facility for fighting fire in the way of water here?

A. No, sir.

Q. No protection for the homes?

A. No, sir.
Q. Did you go to Mrs. Lynch's fire the other night?
A. Yes, sir.
Q. Nothing could be done there?
A. No, sir.
Q. No water to throw on it?
A. No, sir.
Q. No hose to shoot on it?
A. No, sir; we started to get it, and it would not go far enough.
Q. They have a little piece of hose to run around here on the square?
A. Yes, sir.
Q. That was no protection at the depot; they have no water-works by which the depot could be protected?
A. No, sir. The town did not.
Q. Except at the mill?
A. Mr. Adams did.
36 Q. And Mr. Adams got his water from the mill—the mill furnishes them?
A. Yes, sir.
Q. But there is no water system here for putting out fires?
A. No, sir.
Q. No hose company, nor anything, no fire company?
A. No, sir.
Q. What good would a hose do if you had no water; would it be of any use?
A. Not unless you had water.
Q. You could not put out a fire with an empty hose?
A. It does not look so.
Q. You say the doors opened sliding; was that not the best way to protect that building, to have the doors in that condition?
A. That is the way we have them in the cotton mill and in the depot.
Q. That is the best door for a warehouse; they were just ordinary warehouse doors; nothing peculiar about it; a sliding door on a ladder or something and they were fastened every night?
A. As far as I know.
Q. They were not opened, and no part had been opened that you saw?
A. I never saw it.
Q. All six or seven of those doors were closed when you got there?
A. All closed as far as I saw.
Q. Do you know when Mr. Townsend got there?
A. Yes, sir; I saw him.
Q. Where did you see him?
A. Saw him coming across the street to the depot.
Q. Did you see him get in?
A. I did not get on the front; I was helping Mr. Johnson move buggies, and I did not go around there at all.
Q. Do you know whether he tried to get in at all?
A. No, sir.

Q. If there was such a fire that he could not get into the office was it possible for you to save anything?

A. That was fifteen or twenty minutes before he got there.

37 Q. You know that thing burned down in twenty minutes?

A. No, sir.

Q. It did not burn down in twenty minutes?

A. No, sir.

Q. How long did it take it to burn down?

A. I suppose it fell in in thirty or forty minutes.

Q. In what condition was the fire when Mr. Townsend got there?

A. I could not say that, because I was helping move the buggies; I do not believe it was falling in.

Q. You do not believe it was?

A. If so, I did not see it.

Q. The office part and the waiting rooms were not on fire when you saw Mr. Townsend?

A. That was the first place I saw the fire, in the office.

Q. You saw the fire first in the office?

A. Coming through the roof.

Q. On the outside?

A. Yes, sir; at that time.

Q. Was there any ceiling in that depot?

A. I could not tell you.

Q. You saw the blaze through the roof?

A. Saw smoke.

Q. Saw smoke?

A. I saw smoke.

Q. Just smoke?

A. Smoke.

Q. You do not know what the condition was on the inside; was not the smoke coming out all around the ends of that house and all around it?

A. Not when I saw it.

Q. When did it come out of there?

A. In fifteen or twenty minutes or half an hour it was burning through everywhere.

Q. You say it took it about forty minutes to burn up?

A. I said for the roof to fall in.

Q. Who did you say got there after you got there?

A. I do not know.

Q. Give me the name of any one you saw there except Mr. Townsend.

A. I sent the boys to Mr. Hughes, the engineer, and he came.

Q. What time did he get there?

38 A. Mr. Timmerman, that works with the agent, and they all come running down there, and I could not tell you.

Q. They were the only ones you saw?

A. The whole town came there.

Q. All of them saw you there?

A. They ought to.

Q. You are satisfied they saw you at that fire?

A. They ought to.
Q. You are satisfied you were at the fire?
A. Yes, sir.

Redirect examination.

By Mr. Thurmond:

Q. You were asked about when you first told this; do you recall whether you were summoned Saturday or Monday; was it not Monday you were summoned?

Mr. Evans: That is a matter of record.

(By Mr. Thurmond:)

Q. You had a talk with me a few moments ago?

Mr. Evans: He said he did not.
The Court: Do not lead him.

(By Mr. Thurmond:)

Q. When did you have a talk with me before that.

Mr. Evans: That is what he said, that he did not have any.

(By Mr. Thurmond:)

Q. I want to understand whether you meant you never had any talk with me before while ago; when did you have a talk with me about this case?
A. In that little room while ago.

Mr. Thurmond: I knew he meant before he came to Court.
Adjournment for dinner.

The following testimony of E. H. Prescott, taken at a former trial, was read to the jury:

39 E. H. PRESCOTT (white), sworn:

Direct examination.

By Mr. Thurmond:

Q. You are a son of Dr. E. W. Prescott?
A. Yes, sir.
Q. Did you ever come up after freight a few days before this depot was burned down here?
A. Yes, sir.
Q. Did you have much freight in the depot?
A. No, sir, not then; there was some fine feed, I think, it had been there longer than the shoes, and I concluded I would get that first, as I could not carry it all, and I would get what shoes I could carry and leave the rest there, because they had not been there as long.
Q. Did the agent tell you the shoes were there?
A. Yes, sir, and I paid the freight.
Q. You paid the freight on everything you got?

A. Yes, sir.
Q. Everything?
A. On all that was there; yes, sir.
Q. What was said when you paid the freight?
A. Nothing.
Q. Who brought the shoes out to you?
A. I think Mr. Timmerman delivered the stuff.
Q. Did he tell you the other shoes were there?
A. Yes, sir.
Q. You paid the freight on everything that was there?
A. Yes, sir.
Q. And that was all that passed between you?
A. Yes, sir.

Cross-examination.

By Mr. Evans:

Q. You go there to the depot frequently?
A. Not so very often.
Q. You haul freight to your father's store?
A. Yes, sir.
Q. That was on the 23d of June?
A. I do not remember the date.
Q. Was it not about ten days before the fire?
A. It was on the 23d.
Q. Would you say it was ten days before that fire?
A. Yes, sir.
Q. You got a part of the freight and you were informed that it was all there?
A. Yes, sir.
Q. And you told them you could not carry it all on that load, and you asked them to keep it until you could come back for it?
A. Yes, sir.
Q. And they kept it at your instructions as an accommodation?
A. I expected to pay storage.
Q. You got them to keep it until you came back?
A. We were paying for the accommodation.
Q. And you were paying for that storage?
A. Yes, sir.
Q. And willing to let it stay there under that condition?
A. Yes, sir.
Q. But there was no contract for any payment on it?
A. No, sir.
Q. Nothing was said about it at all?
A. No, sir.
Q. Did you see the barrels of water on the platform while you were there?
A. I do not remember about that special date; I saw them nearly every time I went there?
Q. Did you see any bucket hanging around there?
A. Yes, sir.

(By Mr. Thurmond:)

Q. What was said about leaving the freight?
A. He said all right, we could not carry out all a lot of times, and it was all right.
Q. And you paid storage?
A. Not all the time; we would not wait that long.
Q. If you waited too long?
A. Yes, sir; so many days, and then storage begins.
41 Q. They charge storage on freight after it has been there so long a time?
A. Yes, sir.

W. E. PRESCOTT (white), sworn:

Direct examination.

By Mr. Thurmond:

Q. You brought this suit?
A. Yes, sir.
Q. Where were those goods shipped from?
A. Petersburg, Virginia.
Q. Look at that paper (presenting same); what papers are those and what did you do with those papers?
A. In regard to some shoes that were burned.
Q. What did you do with those papers, were they filed with the agent?
A. Yes, sir.
Q. Of the Southern Railway Company?
A. Yes, sir.
Q. Mr. Townsend?
A. Yes, sir.
Q. Did they return them to you?
A. Yes, sir.
Q. They refused to pay for them?
A. Yes, sir.
Q. Whose shoes were they?
A. They were mine.
Q. Is that an invoice for those shoes?
A. Yes, sir.
Q. How many boxes were shipped?
A. Of the original shipment there were thirteen cases.
Q. How many cases were delivered to you?
A. Four cases.
Q. What was the value of the nine cases not delivered?

Mr. Evans: We object to that because it is in writing, and here is the account showing the valuation and everything and not in the doctor's handwriting and not made out by him, but that is a claim he filed with us, and the paper should speak for itself.

Mr. Thurmond: We have to prove that the shoes were worth that.

The Court: Go ahead.

Mr. Evans: As to the account of the shoes, there is his
42 own writing, and that is the claim he filed with us, and we submit that it is the best evidence of what they were worth.

The Court: You are not trying to vary it; you are trying to prove your claim; that is what you are trying to do.

Mr. Evans: That is what he wants to do; the papers are the best evidence; here is the claim he asked us to pay; that is the best evidence.

The Court: Do you deny that?

Mr. Thurmond: He denies everything.

The Court: That is not as to the part of the paper not proven; he is not trying to vary it.

Mr. Evans: If he can prove that paper is what he filed with us and put it in, and not prove that this item was worth so much or that one so much.

The Court: Is that what you are trying to do?

Mr. Thurmond: Prove the value of the shoes that were destroyed.

The Court: Go ahead.

(By Mr. Thurmond:)

Q. What was the value of the entire shipment of shoes?

A. I do not remember.

Q. What was the value of the nine cases that you did not get and left up here; can you refresh your memory?

A. $236.35 and the freight on the nine cases amounting to $5.43, making $241.78.

Q. State to the jury whether that was a fair value for the shoes at this place?

A. That was the invoice price of the goods.

Q. With the freight added?

A. Yes, sir, with freight added.

Q. What date did you file these papers with the agent of the Southern Railway Company at Edgefield?

A. I do not remember the exact date.

Q. Can you tell by referring to that paper there?

A. I think so; July 31, 1913.

43 Q. When did that fire take place?

A. July 4, 1913.

Q. When did you get some of the nine cases of shoes?

A. It was about the 23d of June; about that time.

Q. The 23d of June?

A. Yes, sir.

Q. Did you send your wagons up here before the depot was burned?

A. I sent the wagons up for freight, and my son, E. H. Prescott, and there was not enough freight to fill up the load that I knew was there, and he found out that the shoes had come and he paid the freight and Mr. Townsend delivered four cases to finish out the load.

Q. Did you send your wagon up after that before the 4th of July?

A. Yes, sir.

Q. Did they send the nine cases of shoes?

A. No, sir.

Q. Could they have sent them?
A. Yes, sir.
Q. Who did you send?
A. My son.
Q. Did you send him every time?
A. I do not remember every time.
Q. You do not remember whether he came after that?
A. He came frequently for me.
Q. How far do you live from here?
A. Ten miles.
Q. That was a very busy season of the year?
A. Yes, sir.
Q. When they kept your freight any length of time did you pay storage?
A. I have paid storage.
Q. Did they notify you that they would not keep this freight any longer?
A. No, sir.
Q. Did they give you any notice at all?
A. No, sir.
Q. However, you knew your shoes were here, as your son had told you?
A. Yes, sir.
Q. Did they write you that they would not keep these shoes here as warehousemen at all and that you must get them out?
A. No, sir.
Q. Did you have occasion to visit that depot frequently before that fire?
A. I was there frequently.
44 Q. What did you see in the depot, if anything, in the way of trash or papers?
A. I saw a lot of papers, trash of different kinds.
Q. Where was it?
A. In the northwest corner, principally, of the building.
Q. The northwest corner of the building?
A. Yes, sir.
Q. Did you see any ladder out there by the house?

Mr. Evans: That is not alleged as one of the acts of negligence; here is the specific charge which we are to meet.

The Court: He is on the question of warehouseman; he did not have to allege any negligence at all; all he has to prove is that you were in possession of it as a warehouseman.

Mr. Evans: We only have to show that we exercised ordinary care as a warehouseman.

The Court: If you are a gratuitous bailee, you allege all of these specific acts, he did not have to allege it.

Mr. Thurmond: I did not have to do it.

The Court: Because the law is you were in possession of it, and you are the only one that can explain how it was burned up.

(By Mr. Thurmond:)

Q. Did you notice any ladder about that building?

A. I do not remember seeing any.
Q. Did it have any sprinkler system in it?
A. No, sir.
Q. Did you ever see any hose around there?
A. No, sir.
Q. Do you know whether the building right next to it, Captain Adams' warehouse, has a sprinkler system?

Mr. Evans: What is in another house has nothing to do with what we have got.
Mr. Thurmond: We are showing how easy it would have been to get water from Adams' warehouse; we are showing that he had a sprinkler system in his warehouse.
The Court: What has Adams' warehouse got to do with this case?
45 Mr. Thurmond: To show that they could have gotten water there if they had had any hose; they could have gotten water in twenty yards if they had had a hose; water was convenient if they had had a hose.
The Court: Go ahead; I think you can prove that.

(By Mr. Thurmond:)

Q. Do you know whether Adams' warehouse has a sprinkler system?
A. Yes, sir.
Q. And plenty of water?
A. Yes, sir.
Q. Did you ever see any hose around this station?
A. No, sir.
Q. What height tower would it have taken for a tank to have given plenty of water to put out a fire at that place?

Mr. Evans: We object.
Mr. Thurmond: My purpose is to show that if they had had a well and tower and tank at this warehouse that they could have put it out very easily.
The Court: Go ahead.

(By Mr. Thurmond:)

Q. What height tower would have been necessary?
A. Fifteen or twenty feet.
Q. It was rather a low topped warehouse?
A. Yes, sir.
Q. If there had been a tower and a tank and some hose you could put out a fire pretty well?
A. Yes, sir.
Q. There was no such thing there?
A. No, sir.
Q. Did you see any equipment at all except those barrels of water out on the platform—did you ever see anything else there?
A. No, sir.
Q. What account would that be without a ladder when the fire was on top of the house?

A. I do not see how you could get up to it.
Q. The railway company has never paid you?
A. No, sir.
Q. The railway company has refused to pay you anything?
A. Yes, sir.

46 We offer these papers in evidence.
(Exhibit No. 1.)

Cross-examination.

By Mr. Evans:

Q. You testified in this case the last time it was tried?
A. Yes, sir.
Q. You testified at the last trial of this case here?
A. Yes, sir.
Q. Did you not say at the last trial that you received a card notifying you that your freight was there?
A. No, sir: I do not think I did because I do not know anything about it.
Q. Did you not testify further that that depot was kept as clean and in as clean a condition as any you had ever seen?
A. I do not think I went that far that it was as clean as any I ever saw.
Q. Was it not as clean as any you ever saw?
A. I do not think so.
Q. What was the matter with it?
A. There was a lot of trash there.
Q. Where was the trash?
A. I have seen it on the floor and in the shelf.
Q. What did the trash consist of?
A. Oats, corn, flour, etc.
Q. Did you ever see any hay in that depot on the inside?
A. I do not remember that I ever saw any on the inside.
Q. You never saw anything on the floor except corn, oats, and a little flour?
A. Trash and papers scattered around.
Q. Where did you see the papers?
A. On the floor and shelves.
Q. That is where they kept their supplies to run the office?
A. I don't know.
Q. Were they not in pigeon holes?
A. No, sir.
47 Q. What were they in?
A. In a bundle tied up.
Q. And in the cases on the shelves?
A. Yes, sir.
Q. They were not scattered around there loose anywhere?
A. Those that were on the shelves were not.
Q. You did not see any scattered in the corner, did you, you never saw any loose papers in the corner?
A. I have seen papers in there.

Q. Did you ever see any gasoline there?
A. I do not know that I ever saw any gasoline there.
Q. Is it not a fact that you did receive a postal card like that (presenting card)? That is the one that was shown you at the last trial.
A. No, sir.
Q. Eustis told you the goods were there?
A. He brought out four cases and said the shoes were there; I knew nothing about it until he came back home.
Q. Eustis was authorized to act for you?
A. I sent him after freight.
Q. You sent him to transact business and bring freight?
A. Yes, sir.
Q. And he found this freight, and paid the freight on it, and gave his receipt to the agent?
A. I suppose so.
Q. And receipted for a part of it?
A. Four cases.
Q. You do not know anything about what Eustis and the agent did; you do not know what arrangements they made?
A. No, sir.
Q. You never had to pay storage on these goods?
A. No, sir; but I have on others.
Q. No demand has been made on you for storage on these goods?
A. No, sir.
Q. You say you never received a card like that?
A. I do not remember that I did.
Q. Didn't you testify at the last trial that you received that card?
A. I don't remember that I did; I might have received it after Eustis brought the shoes home, but before that I never re-
48 ceived it, because I did not know anything about the shoes being there until Eustis got back.
Q. You knew these shoes were there on the 23d day of June?
A. Yes, sir.
Q. And this depot was burned on the 3d of July, 4th of July?
A. Yes, sir.
Q. How many days is that?
A. Eight or ten days, somewhere along there.
Q. How many days are there in June?
A. Thirty.
Q. And how many days in July until the 4th?
A. Four.
Q. That is about ten days?
A. Yes, sir.
Q. Do you know whether they got there early in the morning—it was ten days that the goods remained in the warehouse?
A. Yes, sir.
Q. And you made no effort to get them out?
A. I sent my wagons there.
Q. And that brought back a load of freight as far as they could carry?

A. I do not know that they brought back as much as they could carry.

Q. Sometimes freight is very bulky and you can't put much on a wagon?

A. Sometimes.

Q. They brought a load of freight every time they came?

A. Yes, sir.

Q. During those ten days how many times did you send your wagons here?

A. I do not remember.

Q. Two or three times?

A. I do not remember.

Q. Would you be safe in saying once?

A. I think so.

Q. You do not remember who came with your wagon?

A. I do not know whether Eustis came or not.

Q. You knew the only freight in the depot on the 23d of June were those shoes; that the only freight in the warehouse on the 23d of June, and they hauled out this load, was these shoes?

A. As far as I know.

Q. That is all he left?

A. Yes, sir.

49 Q. And you received no notice to carry off the freight from the 23d of June until the 4th of July?

A. I do not remember.

Q. You sent your wagons back between those two dates?

A. Yes, sir.

Q. And they did not bring the shoes?

A. No, sir.

Q. Although the freight had been paid and you receipted for them?

A. Yes, sir.

Q. You had these papers (presenting same), you had all of those papers in your possession?

A. Yes, sir.

Q. They acted for you in shipping those goods?

A. Yes, sir.

Q. Who are those people here?

A. Augustus Wright Shoe Company.

Q. They acted for you in shipping these goods on this bill of lading?

A. Yes sir.

Q. You know that that depot was, as a matter of fact, burned, was it not?

A. Yes, sir.

Q. Was it not a comparatively new depot?

A. I think so.

Q. You are a farmer living ten miles from here; what stock of goods do you carry?

A. Four or five thousand dollars.

Q. Have you a sprinkler system in your store?

A. No, sir.
Q. Have you got a barrel of water setting around in case of fire?
A. No, sir.
Q. And you carry five or six thousand dollars' worth of goods?
A. Yes, sir.
Q. And you have no sprinkler system and no water tower to put water on anything?
A. No, sir.
Q. And this town has no water system?
A. I think so.
Q. Where is it?
A. I see a tank out there on top of the tower.
50 Q. You mean this little tank out here?
A. Yes, sir.
Q. And you know this only extends around the square?
A. I do not know.
Q. You know it does not run down to the depot?
A. No, sir.
Q. This town has no general protection against fire?
A. No, sir.
Q. If a man keeps a warehouse and there is no protection against fire, and he keeps barrels of water and buckets hanging on them, don't you think he is pretty well protected?
A. I do not know.
Q. He is taking the care of a prudent man to protect his property?
A. He could have put in a sprinkler system.
Q. Suppose he did not have the money?
A. The Southern Railroad has got plenty of money.
Q. Suppose you do it, you have the money?
A. The Southern Railroad has lost the depot and you have not.
Q. You have the money to put in yours, why don't you do it?
A. I don't know about that.
Q. You have not got it?
A. No, sir.
Q. You know Mrs. Lynch's house burned?
A. Yes, sir.
Q. No water to protect it?
A. No, sir.
Q. What would be the use of hose without water?
A. I do not know.
Q. It would be a nice ornament to hang on the wall?
A. I guess so.
Q. It would not be any good at all if you did not have water to run through a hose?
A. It would be no service.
Q. Was not that depot located in quite a respectable part of town?
A. I think so.
Q. In a public place?
A. Yes, sir.
Q. Who went back with your wagon the second time after the shoes were left there?

A. I do not know whether Eustis did or not.

51 Q. Do you remember what sort of freight they brought back?

A. I do not know what it was.

Q. You run a grocery store?

A. A general store.

Q. That is the bill and the value of the goods shipped you (presenting same)?

A. The whole business.

Q. By Augustus Wright & Company at Petersburg.

—. ——.

Q. You filed this with the company; the Augustus Wright Company made that out?

A. Yes, sir.

Q. It is their own writing?

A. Yes, sir.

Q. And they made this out for you?

A. I suppose the railroad company did that.

Q. They signed it?

A. I suppose so.

Q. And it is for your benefit?

A. Yes, sir.

Plaintiff rests.

Mr. Evans: We ask your Honor for a nonsuit or the direction of a verdict under the first count in the complaint, as to common carrier. The evidence here shows that this freight arrived here on the 23d of June, and that the freight was paid and receipted for by the agent of Dr. Prescott. He came for it and paid the freight; and I submit that where a common carrier delivers freight in good order, and has it in its depot and paid for, then its liability as a common carrier ceases.

And, further, there is no evidence going to show negligence, from which the jury could infer negligence as set out in the complaint.

The Court: You are on the first count?

Mr. Evans: Yes, sir; that they are liable as insurers.

The Court: And they can only be relieved from that by an act of God or a public enemy.

Mr. Evans: I see the grounds of negligence in the warehouse transaction are set out in the first cause of action and as a common carrier; they are both the same, exactly.

52 Mr. Thurmond: There is no negligence in the first cause of action at all.

Mr. Evans: We ask your Honor for a nonsuit on the whole business. There is no testimony to show that they are liable as a common carrier.

The Court: We will wait until the testimony is all in; you know when you are on actions of this kind, the Supreme Court looks for a scintilla, and that is a very small thing; when the testimony is all in, I will give my decision as to directing a verdict. Go ahead.

Testimony for the Defense.

R. B. ARTHUR (white), sworn:

Direct examination.

By Mr. Evans:

Q. We offer in evidence the certificate of the Secretary of the Interstate Commerce Commission, under the seal of the Court, by its Secretary.

The Court: All right; you are going under the Carmack Act?

Mr. Evans: Yes, sir.

Q. What position do you hold?

A. Commercial agent at Augusta, Georgia.

Q. We offer this in evidence. (Exhibit No. 2.)

Q. This, a certificate of the Interstate Commerce Commission, is the freight rate rules?

A. Yes, sir.

Q. Read that rule?

A. "The reduced rates specified in this classification will apply on property shipped subject to the condition of carrier's bill of lading. Property carried not subject to the conditions of the carrier's bill of lading will be at the carrier's liability, limited only as provided by common law and by the laws of the United States and of the several States, in so far as they apply. Property thus carried will be charged ten (10) per cent. higher (subject to minimum increase of
53 one (1) per cent. per hundred pounds) than if shipped subject to the conditions of the carrier's bill of lading."

Q. How were those goods shipped?

A. They were shipped released, subject to the bill of lading.

Q. What do you mean by released?

A. It is a railway rate specified in the bill of lading; if it is goods that the shipper wants to specify some value on, and do not want to ship them under the conditions of the bill of lading, he is charged ten per cent. higher; if he wants to put other conditions than in the bill of lading he would have to pay ten per cent. higher.

Q. It was shipped under the rule that makes the bill of lading the contract between the parties?

A. Yes, sir.

Q. Has that rule been filed with the railroad offices?

A. Yes, sir; in every office in this country; it is filed with the Interstate Commerce Commission at Washington.

Q. Is that rule in that book?

A. Yes, sir.

Q. Has that been filed in the offices of the Southern Railway Company?

A. Yes, sir.

Q. Can you show me this rule in this book?

A. Yes, sir. (Reads Rule No. 1.)

Q. It is simply a contract as to a common carrier; it does not go to the warehouseman.

The Court: I just wanted to get it straight.

(By Mr. Evans:)

Q. You say that was on file in your office?
A. Yes, sir.
Q. Is that the rate under that bill of lading that the goods were shipped, under Rule No. 1?
A. Yes, sir.
Q. Is there any rate on there?
A. Not from Petersburg.
Q. What are the freight charges?
A. It does not show on here; 82 cents per 100 pounds; that is shown from Lynchburg.
54 Q. And that comes under Rule No. 1, and that is a copy of it?
A. No, sir.

No cross-examination.

J. A. TOWNSEND (white), sworn:

Direct examination.

By Mr. Evans:

Q. What was your position the 4th of July?
A. Agent for the Southern Railway.
Q. Were you railroad agent here on the 23d of June?
A. Yes, sir.
Q. Do you recall the date the depot was burned?
A. Yes, sir.
Q. What was burned at the depot?
A. The depot and the freight that was in the warehouse.
Q. Were your records burned?
A. Yes, sir.
Q. How far did you live from the depot at that time?
A. About one hundred yards.
Q. Who are your assistants?
A. Mr. T. L. Timmerman and Miss Richardson.
Q. And they are the only three persons that work in that depot with you and under you?
A. Yes, sir.
Q. Do you recall that Dr. Prescott had some freight that arrived here about the 20th or 21st of June?
A. Yes, sir.
Q. Do you know whether or not notice was given him that the goods were there?
A. Yes, sir.
Q. What was the notice?
A. Only a card.

Q. A card like that (presenting same)?
A. Yes, sir.

We offer this card in evidence. (Exhibit No. 3.)

Q. That was mailed to him from your office?
A. Yes, sir.
Q. What other notice did Dr. Prescott have?
A. He came there and receipted for the freight.
Q. Came there and receipted for it?
A. Yes, sir.
55 Q. What was done?
A. We delivered him four cases of the shoes.
Q. They were all there?
A. Yes, sir.
Q. Who came to the depot?
A. Dr. Prescott's son came there.
Q. Did he or not pay you the freight on all the goods that were there?
A. Yes, sir.
Q. Why did he not take the others?
A. He wanted to carry some groceries home with him and did not have enough wagons to carry the shoes.
Q. He carried groceries and left the shoes?
A. Yes, sir; he carried a part of the shoes.
Q. Were those shoes delivered to him?
A. Yes, sir.
Q. Were they his property at that time and out from under your control?
A. Yes, sir.
Q. You had accepted the freight for it?
A. Yes, sir; and had his receipt for the goods.
Q. What has become of them?
A. They got burned in the fire.
Q. All the records of that office were burned?
A. Yes, sir.
Q. Did Dr. Prescott send his wagons back to the depot between the 20th and 23d of June and the 4th of July besides that load?
A. Yes, sir.
Q. What did they get then?
A. They got stuff, such as flour, and the like.
Q. But they did not take the shoes then?
A. No, sir; he got freight, but he did not get the shoes.
Q. Got other freight and did not take the shoes?
A. No, sir.
Q. He left them there?
A. Yes, sir.
Q. What was the agreement with reference to holding those goods?
A. He just wanted to know if it would be agreeable to leave them there, and I said it would be.
56 Q. You did not make any charges for storing them?
A. No, sir.

Q. And did not expect him to pay any?
A. No, sir.
Q. And that was the agreement between you and Eustis Prescott that he would come back and get the shoes, and that you would let them lie there as a matter of *recommen*dation?
A. Yes, sir.
Q. How long had the shoes been there before the fire?
A. Ten or twelve days. We delivered him four cases on the 23d of June.
Q. You delivered Dr. Prescott freight between the 23d of June and the 4th of July that came into the warehouse after the shoes did?
A. Yes, sir.
Q. He sent down there and got freight that came in after the shoes had been there for quite a while?
A. Yes, sir.
Q. Groceries and the like?
A. Yes, sir.
Q. Do you smoke?
A. No, sir.
Q. Smoke cigarettes?
A. No, sir.
Q. Do any of your assistants smoke cigarettes?
A. Not that I know of; Mr. Timmerman may smoke cigarettes.
Q. Did you ever see him smoke in the office?
A. I do not recall.
Q. That young lady down there, does she smoke?
A. No, sir; she does not smoke.
Q. It is alleged here that you had a lot of trash and stuff in the warehouse; state to the jury what was in that depot?
A. There was no trash in the depot, only freight.
Q. And that was the only place you had to keep freight?
A. Yes, sir. We had records on the shelves.
Q. On the night you left that office, that freight office, on the 3d of July, were there any matches in that warehouse?
A. Not that I know of.
Q. You locked your doors that night?
A. Yes, sir.
Q. As you always did?
A. Yes, sir.
57 Q. Had you had any fire there that day?
A. No, sir; it was summer time and we needed no fire.
Q. You did not have any sprinkler system there?
A. No, sir.
Q. This town has no waterworks for protection against fire?
A. No, sir.
Q. What protection did you have against fire?
A. We had water barrels around the depot and on the cotton platform, with buckets on them, and we always kept them full of water.
Q. They are good big barrels?
A. Yes, sir.

Q. How many did you have?

A. Six or eight on the warehouse platform and about the same number on the cotton platform.

Q. You mean on the platform by the side of the railroad?

A. Yes, sir. All around the building.

Q. All around the building?

A. Yes, sir.

Q. There were buckets there?

A. Yes, sir.

Q. That morning were those barrels full of water?

A. Yes, sir.

Q. When did you get to the fire?

A. About 5:30 a. m.

Q. Who was there when you got there?

A. There was five or six there.

Q. Were you among the first that got to the fire?

A. Yes, sir.

Q. What did you do when you got there?

A. I went to the office door and tried to get in, and I could not get in.

Q. Was your office on fire then?

A. No, sir.

Q. What part was on fire?

A. In the wareroom.

Q. Was the partition between your office and the wareroom on fire then?

A. No, sir.

Q. Your office was between the waiting room and the warehouse?

A. Yes, sir.

Q. And the waiting rooms and your office were the last part of the station that burned?

A. Yes, sir.

58 Q. Did you make any effort to save the freight and things there?

A. I tried to get in the office, and there was smoke in there and I could not get in.

Q. It was too far gone when you got there?

A. Yes, sir.

Q. Did you see Marion Jackson there?

A. No, sir; I do not remember seeing him.

Q. Who went there with you?

A. Cæsar Simkins.

Q. And that was on the side the cars were on?

A. Yes, sir.

Q. They burned?

A. Yes, sir.

Q. And you did not see Jackson there at that time?

A. No, sir.

Cross-examination.

By Mr. Thurmond:

Q. Did you see him there at all?
A. I do not remember it.
Q. There was a lot of people there?
A. There was a good many there.
Q. Your rules require you to charge storage after goods have been there for so long a time?
A. Forty-eight hours.
Q. You would charge warehouse fees; you mean you would charge storage after they were there 48 hours?
A. Yes, sir.
Q. And if you did not charge a man storage during that time you held his goods there as a common carrier, did you not; you held them as a common carrier?
A. Yes, sir; I suppose so.
Q. That was your custom, was it not? That was your practice, was it not?
A. We generally collected storage.
Q. You collected storage?
A. Yes, sir.
Q. But as I understand you, you did not mean to charge storage in this case, because you held them as a common carrier; did you mean to charge storage on the goods?
A. There was nothing said about storage charges.
Q. You held them as a common carrier?
A. No, sir.
59 Q. Is that right?
A. No, sir; they were held at his own risk.
Q. You sent him this card; you said you would charge him storage, is that correct? Did you say there you would charge him storage?
A. I do not know exactly how the reading is; it says on here that demurrage and storage will be assessed at the expiration of the free time provided by the rules of this company.
Q. What were the rules of the company?
A. The rule of demurrage and storage was to collect storage.
Q. Until you began doing that you held it as a common carrier?
A. It was held 48 hours.
Q. And that was your custom and your practice; you collected the insurance on those goods?
A. Insurance?
Q. Yes, sir.
A. No, sir; we did not collect any insurance.
Q. You did not get any insurance?
A. I do not know about that.
Q. Did not the railroad get the insurance?
A. No, sir; I do not know.
Q. Did not the insurance company pay the Prescott loss?
A. No, sir.

Q. No insurance adjuster came to see about that loss?
A. He looked after the freight.
Q. The insurance man did?
A. To make his adjustment with the insurance company.
Q. Did not the insurance man come and look after the freight and ascertain what freight was destroyed?
A. Yes, sir.
Q. And did not the company collect the money for the freight?
A. No, sir; not for Dr. Prescott.
Q. For all the freight in the depot?
A. No sir; I do not know that.
Q. You do not know that all of that freight was insured,
60 and that your company got the insurance on all of it?
A. No, sir; I do not know it.
Q. The insurance man came and you gave him all the freight?
A. I gave him a record of it.
Q. And did not the company get it?
A. No, sir.
Q. And don't you know that the railroad was going to charge Dr. Prescott enough to cover the insurance?
A. No, sir.
Q. How much freight was there in that depot?
A. In dollars and cents?
Q. Yes, sir.
A. I do not know.
Q. You do not know how much there was?
A. No, sir.
Q. Who represented the insurance company?
A. Mr. Elmore, superintendent of the insurance department at Washington.
Q. Superintendent of insurance at Washington?
A. Yes, sir.
Q. He was the man?
A. His representative.
Q. You have no sprinkler system there?
A. No, sir.
Q. The Adams warehouse has a water system?
A. Yes, sir.
Q. He can put out a fire in his warehouse when it starts?
A. I do not know.
Q. Do you know what a gasoline engine costs?
A. Various prices, I guess.
Q. What is the fair cost of an engine: could you not get a pretty good one for one hundred dollars?
A. I suppose so; a small one.
Q. What would it cost to dig a well?
A. I do not know.
Q. How deep would a well have to be there?
A. About 35 or 40 feet.
Q. That would not cost more than $25 or $30?
A. I do not know.

61 Q. How much would it cost to put up a tank?
A. I do not know.
Q. Two or three hundred dollars would give you a plenty for the whole thing?
A. I do not know.
Q. Would that not make it more safe in case of fire?
A. I guess it would make it a little safer.
Q. With an expenditure of two or three hundred dollars you could make it more safe,—did you have a watchman there?
A. No, sir.
Q. Had no watchman there?
A. No, sir.
Q. Was there any way to enter that warehouse except by going through the office?
A. No, sir.
Q. A little narrow door?
A. It was not a narrow door.
Q. About three feet wide?
A. Yes, sir; about three and a half feet.
Q. And you had to go through that door in order to get into the warehouse?
A. Yes, sir.
Q. And if a little fire started at that door it would cut you off from the warehouse?
A. Which door?
Q. From the office into the warehouse?
A. Yes, sir; if the fire was in there.
Q. There was no way to open any of those doors; they were sliding doors?
A. You could knock the doors down very easily.
Q. Are not those sliding doors and will not fall?
A. We very often have to pick them up and put them back.
Q. Did they not try to knock them down?
A. That morning they tried; they knocked one down in the end of the depot.
Q. Did it take so long?
A. Mr. Johnson said he gave it one or two licks; I know I could do it in two or three.
Q. What are those doors put there for?
A. For protection, to keep people out at night.
Q. And you think a door that you could push down in two or three kicks would keep people out at night?
A. Yes, sir.
62 Q. And if you could give it two or three knocks and knock it down it would keep people out; if you take a sliding door can't you put a lock on the outside; I do not know whether you know anything about the mechanism of that or not; you do not know that you could put a lock on the outside that it would make it more safe that you could not knock it down with half a dozen licks, but could go and unfasten it on the outside and let it slide?

A. If you had it fastened with a lock, I don't suppose so, you could knock it down.

Q. Could you not put a lock on a sliding door and lock it on the outside and make it safer?

A. You could get into it easier.

Q. In that case you could unlock it and get into it quicker?

A. Yes, sir.

Q. Did you have a ladder to go up on top of that house?

A. Yes, sir.

Q. Where was that ladder?

A. At the back end of the depot.

Q. Did you send anyone on there?

A. No, sir.

Q. What sort of a ladder was it?

A. An iron ladder.

Q. Where did it set?

A. Two ladders nailed together there and hanging on nails.

Q. What sort of a ladder?

A. An iron ladder.

Q. Fixed up against one of the posts?

A. Hanging on nails at the end of the depot.

Q. How long a ladder?

A. I suppose it was 12 or 16 feet long?

Q. An iron ladder?

A. Yes, sir.

Q. Hanging on the end of nails inside of the depot?

A. Outside.

Q. Which end?

A. The rear end of the depot.

Q. The rear end of the depot?

A. Yes, sir.

Q. And you had some barrels of water around there on the platform?

A. Yes, sir.

63 Q. And no attempt was made to use that ladder?

A. Not that I know of.

Q. Did you go and see the ladder?

A. No, sir; I did not go around to the end of the depot.

Q. You did not go around there at all?

A. No, sir.

Q. Where did you keep the records and oils and things of that sort?

A. We kept the oil in an oil house away off from the depot.

Q. Where did you keep the other things, the reports?

A. In the office and in the warehouse.

Q. What else did you have in the office besides records?

A. We had some packages of clothing and things.

Q. Where were they?

A. In the office.

Q. All of those things were right in the office?

A. Yes, sir.

(By Mr. Evans:)

Q. Where did you keep your papers and blanks and supplies that you used?

A. We had them in two places, in the office and wareroom.

Q. You heard them testify about the papers being in a bundle; what were those papers?

A. We had records in the wareroom and also on shelves.

Q. In pigeon holes?

A. Regular shelves; just a month's work, we would lay it on the shelves.

Q. And after a month's work was checked up you would file it away?

A. Yes, sir.

Q. And those papers were kept in the wareroom?

A. Yes, sir.

J. W. PEAK (white), sworn:

Direct examination.

By Mr. Evans:

Q. What is your business?

A. Merchant.

Q. You receive freight at the Edgefield depot?

A. Yes, sir.

64 Q. What is a reasonable time to get freight?

A. I think they claim about 24 hours.

Q. What is a reasonable time for a man living in the country to move his freight, or have you had any experience on that?

A. No, sir; not any whatever.

Q. You removed your freight in 24 hours?

A. Not always.

Q. Have you ever allowed your freight to stay there as long as five days?

A. I suppose I have.

Q. Have you ever allowed it to stay there as long as ten days?

A. I do not remember about that; sometimes you don't want it right away and let it stay there a while.

Q. And sometimes you make it the same day.

A. Very often as soon as I get notice.

Q. You have had occasion to go in that depot before it was burned?

A. Yes, sir. I was there every day or two.

Q. What was the condition of that depot as to its being clean and free from rubbish?

A. It always seemed to be in fair condition.

Q. Was it not a pretty depot?

A. I think so.

Q. Did you ever see any trash piled up in one corner?

A. Yes, sir; you could see some trash there sometimes.

Q. Old freight or what?

A. There was always freight in there; I do not know about it being old freight.

Q. You say there was a little trash in one corner?

A. Sometimes you would see a little trash.

Q. What kind of trash?

A. Waste in the depot.

Q. What you saw was corn and grain that was scattered about, and such as flour that would burst the sack?

A. Yes, sir.

Q. How much would be there of that sort?

A. I never noticed any unusual amount.

Q. As much as a peck?

A. It would be scattered about on the floor; I do not know what amount.

65 Q. It would be scattered about?

A. Sometimes it would be piled up while they were sweeping.

Q. Preparing to take it out?

A. I do not know what they were going to do with it; I have seen it swept up there.

Q. And swept up in the middle of the floor?

A. At different places.

Q. Did you not sign a statement in this case?

A. I do not remember.

Q. Do you remember giving Mr. Townsend a statement as to the condition of affairs down there?

A. Yes, sir; I remember that.

Q. That was the truth when you made it?

A. Yes, sir; as I understood it; I do not remember what the statement was or what it was about.

Q. You testified before, too, did you not?

A. Yes, sir.

Q. Were you in that office a day or two before the depot was burned?

A. I was there every few days.

Q. Were you there a few days before it was burned?

A. I think so; I was there nearly every day.

Q. This office and wareroom were in a clean condition?

A. They seemed to be.

Q. No old papers or trash on the floor; did you say that?

A. Yes, sir; I do not know about seeing no trash.

Q. You wrote that (indicating)?

A. No, sir.

Q. It is signed J. W. Peak?

A. No, sir; I did not write that; I signed my name to it.

Q. And you read it before you signed it?

A. I suppose I did.

Q. The day before you went there and there was no trash on the floor of that depot?

A. I did not notice any.

Q. Did you notice any water barrels there?

A. Yes, sir; I noticed them usually.
Q. Were they full of water?
A. Always full of water.
Q. And had buckets there?
A. Yes, sir.
66 Q. This town has no fire protection?
A. No, sir.
Q. No system of waterworks?
A. Nothing only that little tank.
Q. That is only for the public square?
A. Yes, sir.
Q. It is no general protection?
A. No, sir.
Q. And the town has no water supply for the purposes of fire protection?
A. No, sir.
Q. You say you noticed those water barrels; how many water barrels did you notice around the depot?
A. There were several barrels.
Q. The warehouse and depot were some little distance from the cotton platform?
A. Yes, sir.
Q. They were not connected at all?
A. No, sir; there was a street for wagons and buggies to pass.
Q. It was 30 or 40 feet from the cotton platform to the depot?
A. Yes, sir; I expect it was 40 feet.
Q. There were water barrels around the wareroom and depot?
A. Yes, sir; and on the cotton platform, too.
Q. And the buckets were there with them?
A. Yes, sir.
Q. What were they there for, do you suppose?
A. I suppose they were there to put out a fire.
Q. Would or not those barrels on the outside with a fire on the inside, would they have been any good if they had been locked up on the inside?
A. Not if you could not get to them.
Q. Would they be of any use if the doors were locked and they were on the inside?
A. They would not do any good.
Q. Would you put them there to prevent a fire?
A. On the outside.
Q. Do you know anything about the sliding doors there?
A. I know the depot was fastened with sliding doors.
Q. And it was properly fastened; it was a good depot?
A. I do not know that I have ever been in there after it was fastened.
67 Q. It was secure?
A. Yes, sir.
Q. It was a wooden depot?
A. Yes, sir; a wooden building.
Q. No one was allowed to store anything in there unless he was

going to ship it by freight, you could not take a load of freight there and say, I want to store it?

A. I never tried it.

Q. Did you ever hear of anyone doing it?

A. No, sir.

Q. This warehouse was for the purpose of the railroad in handling its freight?

A. Yes, sir.

Q. That was the only place it had to put it?

A. That is all I know of.

Q. Do you know of any other place in town that they have any fire protection or sprinkler system,—is there a sprinkler system in your store?

A. No, sir.

Q. Any barrels of water around there?

A. Nothing of the kind.

Q. Is there anything of the kind in town?

A. I suppose the factory and Adams' warehouse.

Q. We know the factory has waterworks of its own?

A. Yes, sir; and Adams' warehouse.

Q. And that is furnished by the mill?

A. Yes, sir.

Q. And that is the only water protection in town against fire?

A. There are a good many people who have windmills and water tanks; I do not know whether they have much protection; not anything that I know of.

Q. No public fire protection?

A. Nothing except that little tank out there (indicating).

Q. And the depot is the only place where they have any water barrels?

A. None that I know of except at the depot.

Q. None in the business part of the town?

A. No, sir.

Q. Did you ever see a barrel of water with a bucket on it up town?

A. No, sir.

68 Q. Did you ever seen one between your store and home?

A. There was none that I know of except at the depot.

Cross-examination.

By Mr. Thurmond:

Q. And the railroad company knew that and did nothing to prevent it?

A. It seems they should have done it.

Q. The agent lived right here in town, and he knew that; they knew that there were no waterworks in this town?

A. They must have known it.

By agreement the following testimony of Miss Richardson, given in a former trial, was read:

Miss RICHARDSON (white), sworn:

Direct examination.

By Mr. Evans:

Q. What position do you hold with the Southern Railway?
A. Clerk-operator.
Q. You are the telegraph operator also?
A. Yes, sir.
Q. You do all sorts of work in the office?
A. Yes, sir.
Q. Did you ever deliver any freight?
A. Yes, sir.
Q. You have delivered trunks sometimes?
A. No, sir; I never did that.
Q. In what condition was your office kept there?
A. It was very neat and clean.
Q. Were there any loose papers around your office?
A. No, sir.
Q. Where were your supplies kept: the blanks, and so on; one witness testified that there was a cupboard or wardrobe in the warehouse room; was that pigeon holes where your records — kept?
A. They were kept in the office.
Q. And the daily records were kept in the office?
A. Yes, sir.
69 Q. What was kept in those pigeon holes?
A. Old records.
Q. They were filed?
A. Yes, sir.
Q. And placed in there for future use?
A. Yes, sir.
Q. They were not left lying around in there?
A. No, sir.
Q. Was there any pile of trash in that warehouse?
A. No, sir; no trash.
Q. What did you have there for protection against fire?
A. Barrels of water and buckets on the barrels.
Q. Buckets hanging over the barrels?
A. Yes, sir.
Q. Do you remember how many there were?
A. No, sir; I do not remember how many there were.
Q. Those barrels, so far as you know, were kept full of water?
A. Yes, sir.
Q. Do you smoke cigarettes?
A. No, sir.

J. G. Boyd (white), sworn:

Direct examination.

By Mr. Evans:

Q. You were the cotton weigher in the town of Edgefield last year?
A. Yes, sir.
Q. Did you have occasion to go into the depot nearly every day?
A. Yes, sir.
Q. What was the condition of the depot as to trash in the warehouse?
A. Fairly good.
Q. Was there any trash in there?
A. I never saw any.
Q. And you were there nearly every day?
A. Yes, sir.
Q. Did you see any trash in the corner?
A. I did not inspect it; I did not see any.
Q. You never saw it and you were there nearly every day?
A. Yes, sir.
Q. If it had been there you would have seen it?
A. Yes, sir.
70 Q. You call that in good condition?
A. Fairly good.
Q. What do you mean by fairly?
A. Good.
Q. Was it not swept every day?
A. Yes, sir.
Q. Swept out nearly every day?
A. I think so.
Q. There was no piles of papers or anything?
A. I never saw any.
Q. Did you see anything piled up there that was liable to set fire to anything?
A. No, sir.
Q. Were there any protections against fire, any provisions against fire?
A. Nothing more than barrels of water.
Q. Were there any buckets there?
A. Yes, sir.
Q. Buckets on the barrels?
A. Yes, sir.
Q. Were the barrels full of water?
A. Yes, sir.
Q. They were put there for the protection of the warehouse?
A. Yes, sir.
Q. And even had them on the platform?
A. Yes, sir.
Q. Were those barrels full of water on the 23d of June?
A. I could not say about that.
Q. Did you notice them?
A. I never did see them dry; they were always full of water.

Cross-examination.

By Mr. Thurmond:

Q. As I understand it, in passing to and fro you never noticed it very closely to see if it was clean, and your eye did not fall on anything that struck you as being trash?
A. No, sir.
Q. In fact, you never noticed especially about it?
A. No, sir.
Q. You never went in and looked into the corners?
A. It was not my business to inspect it at all; I just went in and out.
Q. You do not deny what these other men said about trash being piled up there; you do not deny that?
A. No, sir; I said I never saw it.

71 (By Mr. Evans:)

Q. You never saw any such thing?
A. No, sir.
Q. If there had been any piles of papers and trash you would have seen it?
A. Yes, sir.
Q. How many doors did that thing have to it?
A. I do not remember.
Q. As many as six?
A. I suppose so.
Q. You do not know anything about how those doors acted or anythink like that?
A. No, sir.

R. C. Padgett (white), sworn:

Direct examination.

By Mr. Evans:

Q. You live in town here?
A. Yes, sir.
Q. What is your business?
A. Cotton buyer and fertilizer business.
Q. Did you have occasion to go to the depot frequently last summer?
A. Yes, sir.
Q. What was the condition of that depot as to it being kept clean, and free from trash and inflammable matter?
A. I do not remember seeing any trash or anything around the depot on the inside.
Q. If there had been any there you would have seen it?
A. More than apt to have seen it.
Q. Did you see any trash piled up in the corner of that warehouse?
A. No, sir.

Q. Did you ever see any loose paper lying around over the floor?
A. No, sir.
Q. Has this town any water protection against fire?
A. No, sir.
Q. Nothing except this tank out here?
A. That tank there, and it is just for the square.
Q. Was that or not a comparatively new depot?
A. It was comparatively new.
72 Q. It was the same style one as is there now?
A. Yes, sir; so far as the warehouse is concerned.
Q. About the same as that?
A. The warehouse is about the same.

Cross-examination.

By Mr. Thurmond:

Q. Did you have occasion to go there in the summer much?
A. Yes, sir; I went down there every day after the cotton season is over and the fertilizer; my fertilizer runs into July and I went very frequently, and in the summer months I stay around the store and look after things.
Q. When you went there you went to look after your freight?
A. Mr. Kemp was sick and I stayed around the store.
Q. You never noticed any trash?
A. I was not looking for trash.
Q. You never noticed a lot of paper next to the walls?
A. No, sir.
Q. You overlooked that; you never saw that?
A. I did not see it; I do not remember seeing it.
Q. You do not remember seeing any paper in the pigeon holes?
A. I saw paper in the pigeon holes in the office.
Q. You saw papers there?
A. I saw papers in the pigeon holes in the office.
Q. Did they file the records there in the office?
A. I do not know whether there was any records or not; there generally was, though.
Q. Do you know anything about any gasoline there?
A. No, sir.
Q. You do not know whether there was any there or not?
A. No, sir; I have seen gasoline there, but I think they kept it on the outside on the platform; I have seen it on the outside.
Q. You have seen it on the outside?
A. Yes, sir.

73 (By Mr. Evans:)

Q. A railroad handles all kinds of freight?
A. Yes, sir.
Q. That was what that depot was for, to keep freight in?
A. Yes, sir.

By agreement the testimony of W. P. Hamilton, given at a former trial, was read to the jury.

W. P. HAMILTON (white), sworn:

Direct examination.

By Mr. Evans:

Q. You lived in town here the 4th of last July?
A. Yes, sir.
Q. Do you remember the morning that the depot was burned?
A. Yes, sir.
Q. Was it or not on the 4th of July?
A. Yes, sir.
Q. You were well acquainted with the depot and the conditions there?
A. I cannot say that I was well acquainted, of course, seeing it from the outside, but not on the inside.
Q. Give me that statement?
A. I only made it in justice to Mr. Townsend.
Q. You were the first man that got to the fire?
A. I was the second; Mr. Townsend crossed the road as I came around.
Q. Mr. Townsend crossed the road as you started around?
A. Yes, sir.
Q. How far did he live from there?
A. He did not live but a short distance.
Q. About 50 yards?
A. Yes, sir.
Q. And when you got there what was the condition of the depot and warehouse?
A. There was no chance to have put it out.
Q. If all five of these big doors had been open when you got there could you have gotten in there to save anything?
74 A. I don't see how you could; it was burning then and had almost caught the cars on the railroad track.
Q. It had almost set fire to the coaches then?
A. Yes, sir.
Q. Did it set fire to the coaches?
A. Yes, sir, and three or four negroes and I run them off.
Q. Did you not use water out of those barrels to put out the fire on the coaches?
A. Yes, sir; I used water from the barrels.
Q. The barrels were there with buckets?
A. Yes, sir; I bursted in the coach door to get in.
Q. You had no trouble bursting in that door?
A. A man can burst into most anything if he wants to.
Q. Have you ever been in that depot?
A. Not enough to say much about it.
Q. Just an occasional visit?
A. Yes, sir.
Q. Do you know Mr. Townsend?
A. Yes, sir.

Q. Do you know whether he smokes cigarettes?
A. I cannot say.
Q. Or T. L. Timmerman or Miss Richardson?
A. No, sir.
Q. Do any of the three employees in that office smoke cigarettes?
A. I don't know; they may and I don't know it.
Q. They are trying to make it appear here that those doors were not properly fastened; that they ought to be so they could be unlocked from the outside; how were they fastened?
A. I don't know; I know they were what I call rolling doors.
Q. Sliding doors?
A. Yes, sir.
Q. Is that as safe as a door like this (indicating)?
A. I think so.
Q. As against thieves is not that the better protection?
A. Yes, sir; I reckon it ought to be against thieves.
Q. Because if you went to batter you would not know
75 where?
A. Because you could batter the hasp off otherwise.
Q. Because they could push off the lock without any trouble and they could not do that with sliding doors?
A. They would understand where the hinges were and cut them off. I do not want to be classed a burglar or anything like that.
Q. But those sliding doors are safer than doors that open like this?
A. I think — that opens on the inside is safer than one that opens on the outside as against burglars.

Cross-examination.

By Mr. Thurmond:

Q. Have you ever examined the doors of the Adams warehouse?
A. Yes, sir; I think so.
Q. And they open from the outside?
A. Yes, sir, they open from the outside; I think they open from the outside.
Q. The testimony shows——
A. I would not say for certain about that; I would rather not say, because I am not certain about that.
Q. Did many rats run out of that house?
A. Yes, sir; a great many.
Q. And big ones?
A. Some large enough to make a good pie; when the building got to burning they would not stay there. They had to go.
Q. A lot of them run out of there?
A. Yes, sir.
Q. Did you notice what papers they kept in the corners, or anything?
A. No, sir; I never had any business except in the office.

T. L. TIMMERMAN (white), sworn:

Direct examination.

By Mr. Evans:

Q. You are a clerk at the depot?
A. Yes, sir.
76 Q. Were you working there during June of last year?
A. Yes, sir.
Q. Do you recall the time that Dr. Prescott's shoes arrived?
A. Yes, sir; some time in June.
Q. Did you or Mr. Townsend deliver them?
A. I think Mr. Townsend delivered them.
Q. You saw them in the warehouse?
A. Yes, sir.
Q. Do you know whether or not Dr. Prescott sent his team there after that?
A. Yes, sir.
Q. Do you recall how many times?
A. Several times.
Q. What did he carry off?
A. Other freight.
Q. That was freight that arrived after these shoes left?
A. Yes, sir.
Q. The shoes were always left and the other freight taken?
A. Yes, sir.
Q. Who else worked there besides you and Mr. Townsend and Miss Richardson?
A. That is all.
Q. Do you know whether or not he smokes?
A. No, sir.
Q. Do you smoke cigarettes?
A. Not while I am on duty.
Q. You do not smoke down here?
A. Not on duty.
Q. You do not when on duty?
A. No, sir.
Q. Did you go to the fire?
A. Yes, sir.
Q. What time did you get there?
A. It was burning right along when I got there.
Q. At the top of the roof?
A. Yes, sir.
Q. Where did you board?
A. At Mrs. Hill's, on the hill above the depot.
Q. And you went as fast as you could go?
A. Yes, sir.
Q. What precautions did you take down there in case of fire; what did you have to stop a fire?
A. Water in barrels.
Q. You had buckets there?

A. Buckets on the barrels.

77 Q. Were they inside or outside?

A. Outside, right at the doors.

Q. Do you know what caused that fire?

A. I do not.

Q. Were there or not any matches in that depot the day before the fire occurred?

A. Not that I know of.

Q. You do not know whether there were any matches in bulk?

A. I do not remember any being there in bulk; I do not remember whether there were any in the depot.

Q. You know that no cigarette stubs were thrown around in that office?

A. I never saw any.

Q. You did not throw any?

A. No, sir; I did not throw any.

Q. What papers, if any, did you keep down there; it is alleged here that there were loose papers in the warehouse that caused the fire?

A. We did not keep any loose in the warehouse.

Q. Were there any loose paper- anywhere?

A. I never saw them.

Q. What sort of a thing did you have for your loose papers?

A. A waste basket.

Q. And your waste papers were put in there?

A. Yes, sir; and emptied every day and sometimes twice a day.

Q. What papers did you have in the warehouse?

A. I do not know of any in the warehouse.

Q. Did you keep any of the old records on the shelves?

A. Yes, sir; we had some records laid up on the shelves.

Q. Did you keep any blanks or supplies in there?

A. I do not think any blanks were in there.

Q. Were those records in a bundle?

A. Yes, sir; tied up.

Q. Was there any trash in any of the corners of the depot?

A. No, sir.

Q. How often was it swept?

A. Once a day and sometimes twice a day, morning and night; it was swept up the last thing at night.

Q. Was there any oil, flour and stuff mixed up in the depot?

78 A. There was flour, but I do not think there was any oil.

Q. Was the flour mixed with the oil?

A. I did not see any.

Q. You brought the flour in in sacks and put it *my* itself?

A. Yes, sir.

Q. And the oil was put by itself?

A. If there was any oil it was outside.

Q. Was there any gasoline there?

A. Not that I know of.

Q. You would have known it?

A. Yes, sir.
Q. And there was none there?
A. Not that I know of.
Q. How many doors were there to the warehouse?
A. Five big doors and the door that lead into the office.
Q. The door leading into the office was like this?
A. Yes, sir (indicating).
Q. And there were five doors eight or ten feet wide?
A. Yes, sir.
Q. How were those doors fastened?
A. They were sliding doors.

Cross-examination.

By Mr. Thurmond:

Q. Do you have any idea as to the quantity of freight that passes through there in a year; I do not suppose you can form much of an idea?
A. I could say about the amount of freight received; something like fifty thousand dollars a year.
Q. That is the charges on the freight?
A. Yes, sir.
Q. What do you do with what you call old hoss freight?
A. Ship it back.
Q. How often do you ship it back?
A. Every six months.
Q. Where did you put it there?
A. I do not think we had enough to put anywhere.
Q. When did you make a shipment?
79 A. I do not think there had been any there to ship; we had shipped it off and the warehouse was clean.
Q. Did you not at times have right good accumulation there; where was that put?
A. When it was there it was put in the middle of the warehouse.
Q. In the middle of the warehouse?
A. Yes, sir.
Q. And you have a pretty big pile of it sometimes?
A. Very hardly ever have any to amount to anything.

(By Mr. Evans:)

Q. Why did you put it in the center of the warehouse?
A. We generally packed it where we had the most room.
Q. Was it not your custom and practice to put the merchants' freight along by the wall where you had their names?
A. Yes, sir.
Q. And every man's freight was put under his name?
A. Yes, sir.
Q. And the only vacant place was in the middle of the house?
A. Yes, sir.
Q. And you put this freight in there?
A. Yes, sir.

J. H. TOMPKINS, sworn:

Direct examination.

By Mr. Evans:

Q. What position do you hold with the mill?
A. Paymaster and cashier.
Q. Did you or not have occasion to go to the station pretty frequently?
A. Yes, sir.
Q. How often would you say?
A. I would go every day sometimes and maybe a day or two I would not go.
Q. You went four or five times a week?
A. Yes, sir.
Q. And you knew the people there, Mr. Townsend, Mr. Timmerman and Miss Richardson?
A. Yes, sir.
Q. Did you ever see any of them smoking cigarettes while
80 on duty?
A. I can not recall it; probably I have, but I can not say.
Q. Do you know the condition of that warehouse as to its being kept clean and in a proper condition for handling freight?
A. It was kept as clean as the average warehouse, and I think a little more so; in the summer the freight is lighter than in the fall, and it is usually clean for that kind of a warehouse.
Q. That warehouse was used for freight that comes in and goes out?
A. Yes, sir.
Q. And it is not like the Adams warehouse that anyone could store freight in?
A. No, sir.
Q. Did you go to the fire?
A. Yes, sir.
Q. What part was standing when you got there?
A. The front of it.
Q. You mean the office?
A. The waiting room part of it; I think the roof was all burned in.
Q. All the warehouse had fallen in?
A. Yes, sir.
Q. Do you know what protection or precaution they had taken against fire?
A. They had barrels full of water, and buckets.
Q. How long do you all generally leave freight there?
A. We generally haul it out as fast as it comes in; we generally make it a rule to haul freight once a day.
Q. What would you consider a reasonable time to move your freight?
A. Three days, I suppose. I think that is the time they give you; I think they charge you storage after 72 hours.
Q. You always got yours out before that time?

A. Yes, sir.

Q. Would you consider it a reasonable time to move it after you got notice?

A. Yes, sir; I think so.

Q. There are no waterworks in this town for the protection against fire?

A. No, sir.

81 Q. Nothing except the mill, and that is the only place there is?

A. Yes, sir; and Adams' warehouse.

Q. That is protected against fire, is it not?

A. Yes, sir.

Q. Is your mill allowed to furnish water to anyone?

A. No, sir; we could not furnish it to anyone, but the Adams warehouse; when anyone has a fire we are always glad to help them to protect ourselves if it is in distance.

Q. Is it not a fact that the insurance companies will not allow you to furnish water on the outside?

A. They will not let us run out of water; we have to keep water for our own protection.

Q. They will not allow you to furnish it to other parties?

A. No, sir.

Q. And Mr. Adams could not furnish any water except what he got from you?

A. No, sir; none except what he got out of our big tank.

Q. And he has no right to furnish it to anyone?

A. No, sir; but in case of fire, if we can get at it, if we can get our hose to it, we are glad to help them out, because it endangers our property, too.

Q. You say the warehouse was kept as clean as any warehouse?

A. Yes, sir; as clean as the average warehouse.

Q. There was nothing to indicate or create a fire?

A. No more than in the average depot, freight, etc., I do not know that they had.

Q. Was there any more than in one of these stores?

A. Yes, sir; at times.

Q. Are not the articles in a store more inflammable than the stuff that was in that depot?

A. About the same thing.

Q. Are the goods not in boxes and sacks when they come there and they take them out and get them loose?

A. Yes, sir; as soon as they get them in the stores.

82 Cross-examination.

By Mr. Thurmond:

Q. The mill furnishes water from the Adams warehouse?

A. Yes, sir.

Q. And you are glad to furnish water to anyone in case of a fire?

A. Yes, sir; in reach of our hose.

Q. And it furnishes water to anyone in case of a fire?

A. Yes, sir.
Q. There was times before that fire when you had seen a lot of stuff piled up in that depot?
A. Yes, sir; I had seen a lot there.
Q. Had you not seen a lot of trash there?
A. Yes, sir; during the season when they were busy taking freight.

Case for the defense.
Nothing in reply.

EXHIBIT 1, O. B. A.

Bill of Lading, Original Invoice (or Certified Copy), and Payee's Receipt to Accompany this Paper.

Owners' or Consignees' Verification.

STATE OF SOUTH CAROLINA,
County of Edgefield, ss:

Before the undersigned authority, personally appeared W. E. Prescott, to me well known, who, being duly sworn, says that he is the owner of the property described in the claim attached hereto and that said claim is computed at the value of said property at the place and time of shipment, in conformity with the terms of the bill of lading under which same was received, and is a just debt against the Southern Railway Company by reason of the damage or destruction of said property by fire while in transit on said railway depot at Edgefield, S. C., on the 4th day of July, 1913, and that the said property was not (*) covered by insurance directly or indirectly.
83 (If insured give name of Company).....
.....

(*) If there be no insurance taken out by the Consignor or Consignee insert the word "not."

W. E. PRESCOTT. [SEAL.]

Subscribed and sworn to before me at my office in Edgefield, S. C., this the 31st day of July, 1913.

E. J. MIMS, [L. S.]
Not. Pub., S. C.

NOTE.—It is understood, that if the property was insured by the Consignor or Consignee, the fact that such insurance had been procured does not necessarily release the carrier from liability for the loss.

THIS PAGE IS BOUND VERTICAL IN BOOK

12-612 2500 M C 26079

Form 1888

FREIGHT BILL

Consignee *W. E. Prescott* Station

St. Address

Destination

Pro. Number *726*

Date *22/4* 1913

To SOUTHERN RAILWAY COMPANY

For Transportation Charges on Articles Way-Billed from *Richmond, Va.,* via

85

Date of Way-Bill	Articles and Marks	Weight	Rate	Charges and Freight	
6/21 1913					
Number of Way-Bill					
9404	*13 Cs Shoes*	*890*	*82*	*7*	*30*
Car Initials					
SOU					*45*
Car Number	PAID Jun 24, 1913 J. A. TOWNSEND				
33299	Per			*7*	*75*
Consignor					
Connecting Line Reference, Original Car and Way-Bill Number and Point of Shipment					
	Received Payment 191				
	Agent				
	Per Cashier	Drayage			
		Total to Collect			

Original Paid Freight Bills should accompany all claims for overcharge, loss or damage.
Demurrage and Storage will be assessed at the expiration of the free time provided by the rules of this Company.

Prescott v. Southern Railway Company.

W. E. PRESCOTT,

General Merchandise.

Groceries, Dry Goods, Shoes, Fertilizers, Buggies, Wagons, Stoves.
Shipping Point and Express Office, Edgefield, C. H. S. C.

Modoc, S. C., R. F. D. No. 1 .....191...

	Case	Pairs	Description	Stock No.	Size	Price	
	8	12	Blu	1962	3-8	1 65	19 80
841	8	12	Butt	1957	3-8	1 65	19 80
	8	12	Blu	1974	3-8	1 70	20 40
	9	12	Blu	114	3-8	1 15	13 80
	3	1	Pol	550	9-10	1 35	5 40
	4	9	Blu	2339	6-10	2 90	26 10
	3	1	Butt	2852	6 1-2	2 90	2 90
	9	12	Butt	306	3-6	50	6 00
	7	6	Butt	2773	13-2	1 25	7 50
	9	12	Blu	1330	5-8	1 25	15 00
	11	12	Blu	1331	5-8	1 25	15 00
	7	12	Blu	1372	13-2	1 10	13 20
	12	12	——	106	7-11	1 25	15 00
842	13	12	——	121	6-11	1 15	13 80
	3	2	——	106	12	1 35	2 70
	7	6	——	124	3-6	1 00	6 00
	3	3	Blu	1670	8-9	2 75	8 25
	2	6	Blu	155	8-11	1 75	10 50
	2	3	Blu	1671	9-10	2 70	8 25
					C		50
	4	3	Short	2272	6-8	2 15	6 45
							236 35

843

G. C. WRIGHT, Pres. & Treas. H. E. WRIGHT, Sec'y.

A. WRIGHT, Jr., Vice Pres't.

AUG. WRIGHT CO.

Established 1865—Incorporated 1902.

Boots, Shoes, Rubbers, Leather and Findings.

Petersburg, Va., June 18, 1913.

Sold to Mr. W. E. Prescott, Modoc, S. C., R. F. D.
This Bill is Due and Payable
Less 2 per Cent. 10 days or NET CASH. Dict.

	Case	Pairs	Description	Stock No.	Size	Price	
844	8	12	Blu	1962	3-8	1 65	19 80
	8	12	Butt	1957	3-8	1 65	19 80

MODOC, S. C., R. F. D. No. 1, —— —, 191-.

M——

W. E. Prescott,

General Merchandise, Groceries, Dry Goods, Shoes, Hats, Fertilizers, Buggies, Wagons, Stoves.

Shipping Point and Express Office: Edgefield C. H., S. C.

	6.45
	10.00
	31.80
	15.90
	10.60
	2.10
	2.00
	6.00
	6.60
	1.60
84	12.00
	9.60
	3.70
	9.90
	128.25—Saved.
	236.35—Burned.
	364.60

W. E. Prescott,

General Merchandise, Groceries, Dry Goods, Shoes, Hats, Fertilizers, Buggies, Wagons, Stoves.

Shipping Point and Express Office: Edgefield C. H., S. C.

MODOC, S. C., R. F. D. No. 1, July 23, 1913.

Southern Railway Co. to W. E. Prescott.

To 9 cases shoes, stock numbers attached	$236.35
To freight on 9 cases	5.43
	$241.78

(Here follows freight bill marked pages 85 and 86.)

87

Case.	Pairs.	Description.	Stock No.	Size.	Price.	
8	12	Blu	1974	3-8	1 70	20 40
4-5	6	Butt	2272	4-8	2 15	12 90
9	12	Blu	444	3-8	1 15	13 80
6	8	Pol	550	7-8	1 25	10 00
3	4	Pol	550	9-10	1 35	5 40
10	12	Blu	1688	6-10	2 65	31 80
5	6	Blu	2842	6-9	2 65	15 90
4	9	Blu	2339	6-10	2 90	26 10
5	4	Butt	2389	6-10	2 65	10 60
3	1	Butt	2852	6-2	....	2 90
1	1	Butt.	2043	3-2	....	2 10
6	12	Inf	....	1-4	16 2-3	2 00
1	6	Butt	2777	7-8	1 00	6 00
9	12	Butt	306	3-6	50	6 00
7	6	Butt	2773	13-2	1 25	7 50
1	6	Butt	2774	8-12	1 10	6 60
1	1	Butt	2730	21-2	....	1 60
9	12	Blu	1330	5-8	1 25	15 00
11	12	Blu	1331	5-8	1 25	15 00
7	12	Blu	1372	13-2	1 10	13 20
6	12	Blu	1373	9-12	1 00	12 00
6	12	Blu	1379	6-8	80	9 60
12	12	Tie	106	7-11	1 25	15 00
13	12	Tie	121	6-11	1 15	13 80
3	2	Tie	106	12	1 35	2 70
7	6	Tie	124	3-6	1 00	6 00
3	3	Blu	1670	8-9	2 75	8 25
2	6	Blu	155	8-11	1 75	10 50
1	2	Blu	156	12	1 85	3 70
1	6	Blu	154	7-11	1 65	9 90
2	3	Blu	1671	9-10	2 75	8 25
				c		50
						$364 60

88 EXHIBIT 2, O. B. A.

Interstate Commerce Commission,
Washington.

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached (consisting of two typewritten sheets) contain true and correct extracts from the schedules therein more particularly described, said schedules having been filed with the said Interstate Commerce Commission on dates specified in said papers, and the said extracts therefrom being in force on June 11, 1913.

35

FORM 281—White
(Pads 50 sets—2000 M sets. 2-3-10 C 1853)

STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE

Seaboard Air Line Railway

SHIPPER'S No. _____

AGENT'S No. _____

L. E. CHANDLER, General Freight Agent
Norfolk, Va.

W. L. STANLEY, General Claim Agent,
Portsmouth, Va.

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading.

At PETERSBURG, VA., JUN 18, 1913, from AUGUSTUS WRIGHT CO the property described below, in apparent good order except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from _____

to _____ **is in Cents per 100 Lbs.**

If—Times 1st Class	IF 1st Class	IF 2d Class	IF Rule 25	IF 3d Class	IF Rule 26	IF Rule 28	IF 4th Class	IF 5th Class	IF 6th Class	IF Class A	IF Class B	IF Class C	IF Class D	IF Class E	IF Class H	Per Bbl. IF Class F	If Special per ____

(Mail Address Not for purposes of Delivery.)

Consigned to W. E. PRESCOTT.

Destination, EDGEFIELD; State of S. C.; county of .....

Route, C. & W. C.; Car Initial..... Car No. .....

No. Packages	Description of Articles and Special Marks	WEIGHT (Subject to Correction)	Class or Rate	Check Column
	(13) *Thirteen Cases Boots & Shoes*			

If charges are to be prepaid, write or stamp here, "To be prepaid."

Received $_____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per _____

(The Signature here acknowledges only the amount prepaid.)

Charges Advanced:

$_____

Receive, carry and deliver the articles above subject to the conditions on the face and back hereof, all of which are agreed to.

AUGUSTUS WRIGHT CO., PETERSBURG, VA. Shipper.

Per .....

L. R. COULDER, Agent

Per .....

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)

NOTE.—Unless this Bill of Lading is signed by the shipper, this shipment will be carried at the carrier's liability limited only as provided by Law; but subject to the terms and conditions of the Bill of Lading in so far as they are not inconsistent with such common carrier's liability.

$8 1/2

CONDITIONS.

Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession, the carrier or party in possession shall not be liable for loss, damage or delay occurring while the property is stopped and held in transit upon request of the shipper, owner or party entitled to make such request; or resulting from a defect or vice in the property, or from riots or strikes, or for country damage on cotton. When in accordance with general custom, or account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars), shall be liable only for negligence.

In case of quarantine the goods may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's despatch, or at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when goods are so discharged, or goods may be returned by carrier at owner's expense and risk to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to goods shall be borne by the owners of the goods or be a lien thereon. The carriers shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required by quarantine regulations or authorities, even though same may have been done by carrier's officers, crew, agents or employees, nor for detention, loss or damage of any kind occasioned by quarantine or the enforcement thereof.

Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and, except as otherwise provided by law, acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable despatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot or place of delivery of the carrier, or warehouse, subject to reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder, and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves or landings, shall be at owner's risk until the cars are attached to and after they are detached from trains, or until loaded into and after unloaded from vessels.

Sec. 6. No carrier will carry or be liable in any way for any documents, specie or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in Section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no such carrier or party in possession shall be liable for any loss or damage resulting from fire, or for any loss or damage resulting from the perils of the lakes, sea or other waters; or from vermin, leakage, chafing, breakage, heat, frost, wet, explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, whether existing prior to, at the time of, or after sailing; or unseaworthiness; or from collision, stranding or other accidents of navigaton, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at any port or ports, to tow and be towed, to transfer, to tranship, to lighter, to load and discharge goods at any time, and assist vessels in distress, and to deviate for the purpose of saving life or property. Such water carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry such property upon deck.

The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors when performed by the rail carrier, and the liability for such lighterage shall be governed by the other sections of this instrument.

Sec. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

In witness whereof I have hereunto set my hand and affixed the seal of said Commission this 16th day of February, A. D. 1914.

[SEAL.] GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

Extracts from Southern Classification No. 39, W. R. Powe, Agent, I. C. C. No. 17, Filed on May 4, 1912; Said Extracts Being in Force on June 11, 1913.

Page i. List of Issuing Lines.

Members of Southern Classification Committee.

* * * * * * *

Southern Railway Co.....(FX1, No. 1)

* * * * * * *

Page 1.

Southern Classification.

General Rules.

Rule 1.

The reduced rates specified in this Classification will apply only on property shipped subject to the conditions of the Carrier's Bill of Lading.

(Here follows bill of lading marked page 88½.)

89 Property carried not subject to the conditions of the Carrier's Bill of Lading will be at the carrier's liability, limited only as provided by common law and by the laws of the United States and of the several States, in so far as they apply. Property thus carried will be charged ten (10) per cent. higher (subject to a minimum increase of one (1) cent per hundred pounds) than if shipped subject to the conditions of the Carrier's Bill of Lading.

* * * * * * *

Page 51.

Item No.		Class if released.
1	Books—Continued:	
*	* * * * * *	
3	Books, not otherwise indexed by name, in boxes.....	1
*	* * * * * *	

Extracts from E. H. Hinton, Agent, Southeastern Carolina Tariff No. 2, I. C. C. No. A-58, Filed on October 2, 1912; the said Extracts Being in Force on June 11, 1913.

Title Page.

* * * * * * *

Governed, except as otherwise provided herein, by Southern Classification No. 39, Agent W. R. Powe's—I. C. C. No. 17, Supplements thereto and reissues thereof. * * *

* * * * * * *

Page iv.

Issuing Carriers for Which E. H. Hinton is Agent and Attorney.

Name of carrier.	FX1—No.
* * * * * * *	
Southern Railway Company.....	68
* * * * * * *	

90 Page xxiii.

Index to Points of Origin and Application of Rates Therefrom.

* * * * * * *

Stations.		Initial lines via which rates apply.	Group No.
Atlanta.....	Ga.	Sou. Ry.....	1
* * * * * * *			

Page 337.

Class Rates in Cents.

Index. No.	To— From	Per hundred pounds. 1
* * *	Southern Ry. Stas. Columbia Division.	
* * * * * * *		
	Aiken Branch.	
8	Edgefield.....S. C.	Group 1 80
* * * * * * *		

91 EXHIBIT 3—O. B. A.

6-17-'13. 120 M. C. 31146. Form 2192.

Southern Railway Co.

Station. Date.

.....191.....

Consignee. Address.

The following freight consigned to you has arrived, and is ready for delivery to you from:

Shipper	Station	Date	Pro. No.

Articles.

Initials. Number. X Number.

Freight and Charges, $——

Demurrage and storage will be assessed at the expiration of the free time provided by the rules of this Company.

This Company will be liable only as warehousemen while the L. C. L. freight is in their possession, holding same only at owner's risk of loss by fire.

Strangers must present evidence of ownership, or be identified before delivery will be made.

—— ——, *Agent.*

Sign this notice, authorizing delivery to bearer.

or _____

_____ Consignee.

Mr. Thurmond: The plaintiff withdraws his cause of action against the defendant as a common carrier and withdraws his cause of action against the defendant for the penalty, and the case proceeded to trial only on the cause of action against the defendant as a warehouseman.

Mr. Evans: We will ask for a verdict on the other, as he has withdrawn the actions for the penalty and as common carrier.

The Court: It is on the question of a warehouseman.

Mr. Evans: We take the position that under the Interstate Commerce Commission Rules, as adopted and published by
92 the railroad, that this bill of lading which my friend has introduced in evidence, we are entitled to have the action as to the warehouseman dismissed; we think we are entitled to have your Honor instruct the jury that the contract between Dr. Prescott and the railroad company, as contained in this bill of lading, is the law. The bill of lading was the contract under which the railroad accepted this freight. We take the position that the bill of lading is the law and the contract in this case, and that we are entitled to a verdict.

The Court (after hearing arguments): Go to the jury, gentlemen.

Under the close of the arguments to the jury, the Court delivered the following charge:

Charge.

Mr. Foreman and Gentlemen of the Jury: This is an action brought by the plaintiff against the defendant for $241.78. Now, originally there were three causes of action in this complaint, but the first and third causes are eliminated, and you are confined solely to the second cause of action, that is, the liability of the defendant as a warehouseman.

The complaint alleges that the railway company is a corporation, and that the plaintiff had shipped to him from Petersburg, Virginia, over the defendant's line of railway, thirteen cases of shoes, and that they arrived here, and that upon their arrival he received four cases of the shoes, leaving in the possession of the defendant nine cases of shoes, which *was* destroyed by fire while in the defendant's warehouse. The plaintiff contends that it was due to the negligence of the defendant; and that he made claim, or filed his claim with the railway company to be paid for the shoes, and that he has never been paid for them.

The defendant comes in and denies that it was negligent, and denies each and every allegation of the complaint, and sets
93 up here that its depot was destroyed by fire, and that it does not know the origin of the fire, and denies any negligence on its part, and contends that the plaintiff had a reasonable time to remove the goods, and that in not so doing he was negligent, and has no right to recover. Those are the issues before you.

In this complaint there are certain specifications of negligence, which it is not incumbent on the plaintiff to establish, because the burden of showing that there was no negligence is on the defendant. All the other allegations in the complaint it is incumbent on the

plaintiff to establish by the greater weight or preponderance of the evidence before he can have the right to recover.

Now, gentlemen, what is the law. If a warehouseman is in possession of another's property, the law requires the warehouseman to exercise ordinary care, that is, such care as a person of ordinary prudence would have exercised under the circumstances. Now, what relation existed between this defendant and the plaintiff. If you find that the goods were in the possession of the defendant when it was destroyed, then the relation was either that of warehouseman or gratuitious bailee. When goods transported by a railway company arrive at their destination, its liability as a common carrier continues until the consignee has a reasonable time within which to remove them. That is eliminated from this case. But even after the lapse of a reasonable time after its liability as a common carrier has ceased to exist, it is nevertheless liable, by operation of law, as a warehouseman, although the goods may not have been unloaded and deposited in its warehouse used for storing freight, technically termed a warehouse. Until a reasonable time has elapsed after the arrival the common carrier,—but that part as to the common carrier has been eliminated. But after that time it is only bound as a warehouseman to exercise ordinary care. As a ware-
94 houseman the railroad company has the right to exact storage charges as long as such relation exists in the particular case, and until it ceases to be a warehouseman its liability for ordinary negligence continues.

The fact that it has the right as a warehouseman to collect storage charges makes it a bailee for hire and prevents it from claiming that it was merely a gratuitous bailee, at least before it gives notice that it will not insist upon such charges, and will not longer hold possession of the property as a warehouseman.

Now, what relation existed between these parties,—the plaintiff and defendant relative to the nine cases of shoes, which it is alleged were destroyed. Was it that of a warehouseman? Did the company have the right at the time of the destruction of the property to charge for storage? If so, then, they are warehousemen, and they must exercise ordinary care; and if they failed to exercise ordinary care, they are guilty of negligence, and if that negligence was the direct and proximate cause of the loss, they are liable; but if the relation of warehouseman had been severed, then the relation of gratuitous bailee arises, and the railroad company is only required to exercise slight care, consequently it is liable in case of gross negligence. Slight care means that you exercise such a degree of care as an indifferent man would have exercised. You have heard the facts and circumstances of this case. It is for you to say whether the railroad company was negligent, and they must show to your satisfaction that they were not negligent; what precautions were taken, and all that sort of thing. I cannot express an opinion on the facts. You have heard the testimony and it is for you to determine whether they were negligent or not.

95 The defendant has submitted certain requests to charge. I cannot charge the first. The second I charge:

"2. When property is in the possession of a carrier as warehouse-

man, the warehouseman is only required to exercise ordinary care in the protection of the property. Ordinary care is such care as a prudent man would exercise in the protection of his property." I charge you that. That is what that means.

Now the sixth:

"6. That if the jury find from the evidence that the goods were in the warehouse of the defendant railway company by the instruction of the plaintiff and by his request, then the railway company is only liable as a warehouseman, or an accommodation bailee, and was only due to exercise slight care." I cannot charge you that as it is and I will modify it. If it was understood that storage charges were not to be required, then the relation of gratuitous bailee arose, and they were only liable for slight care. All of the other requests to charge I have refused.

Now, gentlemen, the measure of damages is this: It was admitted here in Court by counsel that this was the invoice price of the goods.

Mr. Thurmond: That is admitted.

The Court: You cannot give more than they risk, but you can give any amount under that that you see fit. Whatever your verdict may be for the plaintiff, say we find for the plaintiff so many dollars, writing it out, and sign your name as foreman. If you find for the defendant say, we find for the defendant, and sign your name as foreman. Is there anything else, Mr. Evans?

Mr. Evans: No, sir.

The Court: Hand this paper to the jury.

Retire.

96

Motion for New Trial.

Mr. Evans: We ask for a new trial in this case, because we think it was error on the part of the Court in holding that there was no Federal question raised in this matter. There was testimony introduced, and the rules and regulations issued by the Interstate Commerce Commission as to interstate shipments. In fact, he admitted it was an interstate shipment, and under the Federal Act. Where a loss is shown to be by fire, then the burden of proof shifts back to the plaintiff and he must prove it. After we show the fact that it was a fire, then under the Federal decisions and under the Federal Act, that becomes a Federal question, and the burden is shifted from defendant to plaintiff. We submit that there is an absolute want of testimony going to show any negligence on the part of the defendant in this action; and no negligence having been proven, we are entitled to have a verdict directed, unless there is negligence shown, or gross negligence shown, even if we were warehousemen. It must be shown by the plaintiff that we were negligent and in what particulars we were negligent. They simply cannot say we had the goods and they were lost; after we show it was lost by fire, they must show that it was lost by our negligence.

That your Honor erred in not charging our fourth and fifth requests to charge.

And in holding that there was no Federal question involved.

The Court: Now, under the Federal question, the interstate commerce rule, when does liability stop?

Mr. Evans: When the freight arrives at its destination and is delivered.

Mr. Thurmond: There is no Federal question raised, but if there was a Federal question, your Honor has gone as far as you could have gone under the Federal Act.

97 Mr. Evans: Your Honor stated in the presence of the jury that the Federal decisions were not binding on you, that you were trying this case under the South Carolina decisions.

The Court: There is no doubt about that. I charge the law as laid down in *the* Brunson & Boatwright v. The Atlantic Coast Line. You are right about that. If there is a Federal question, I will be reversed; if there is no Federal question involved, it will stand, unless they reverse these other two cases. The motion is refused.

Exceptions.

To J. William Thurmond, Esquire, Attorney for Plaintiff:

Please take notice that the defendant, Southern Railway Company, in pursuance of its notice of intention to appeal heretofore served upon you, comes now and makes the following exceptions to the rulings and charge of the presiding Judge in the above stated case, and upon which exceptions the said Southern Railway Company will ask that the judgment entered in said cause shall be reversed and a new trial granted.

1. Excepts because the presiding Judge erred in charging the jury that in the complaint there were certain specifications of negligence which it was not incumbent upon the plaintiff to establish because the burden of showing that there was no negligence is on the defendant, and in further charging the jury that the fact that it (the carrier) has a right to collect storage charges as a warehouseman makes it a bailee for hire and prevents it from claiming that it is a gratuitous bailee, at least before it gives notice that it will not insist upon such charges and will not longer hold possession of the property as a warehouseman, and further charging that "it is for you to say whether the railroad company was negligent, and they must show to your satisfaction that they were not negligent, what precautions were taken, and all that sort of thing. I cannot express an opinion on the facts;" the error consisting in this, that it

98 appearing from the complaint that the shipment of goods the loss of which was sought to be recovered was a shipment by the defendant company originating at Petersburg, Virginia, on the line of railroad of the Seaboard Air Line, and was shipped over the connecting lines of said Seaboard Air Line to the line of this defendant, Southern Railway Company, to Edgefield, South Carolina, and this being admitted by the answer, and it further appearing that the testimony introduced showed that such goods had not been delivered to the consignee, it was indisputable that the shipment was an interstate shipment, and the liability of the defendant therefor

was governed exclusively by the Act of Congress known as the Act to regulate commerce and the Acts amendatory and supplementary thereof, and that such statutory law of Congress was exclusive and all State statutes and public policy, as well as common law decisions, were suspended and abrogated upon the passage of such Acts, and the defendant was entitled to have its liability determined according to the provisions of said statutes and the rules of the common law obtaining in the Federal Courts inhering in and preserved to the defendant by virtue of said Acts as valid*ity* modified by the provisions of the bill of lading which was introduced in evidence, and to the privilege and immunity of freedom from having its rights, obligations and liabilities under said bill of lading controlled or affected by the statutory law of the State, as well as its jurisprudence and public policy; that in and by the rules of common law obtaining in the Federal Courts inhering in said Acts of Congress and made binding by virtue thereof upon State Courts, the burden of proof was upon the plaintiff to show that the defendant was guilty of the acts of negligence averred in the complaint, and the presiding Judge should have charged that, after the defendant had shown that the loss of the goods was by reason of a fire which destroyed its station
99 and warehouse, in accordance with the Federal decisions it was then the duty of the plaintiff to show that such fire was caused by the negligence of all or any one of the omissions or commissions of want of ordinary care charged in the complaint.

2. Excepts because the presiding Judge refused to charge the defendant's third request, which was as follows: "3. When property in the hands of a warehouseman is destroyed by fire (if the same was destroyed by fire) the burden of proof is upon the plaintiff to show that the fire that destroyed the property was caused by the negligence of a warehouseman, and such negligence was the proximate cause of the loss," the error of law being that, by the admitted allegations of the complaint, and by the undisputed testimony, the shipment of said goods was an interstate shipment, and that the same had not been delivered to the consignee, and it was controlled exclusively by the Act to regulate commerce and the Acts amendatory and supplementary thereof, and that such being the case, then the proposition laid down in said request was a correct proposition of law.

3. Excepts because the presiding Judge refused to charge the defendant's fourth request, which was as follows: "4. That the shipment of freight from one State to another is an inter-state shipment, and governed and controlled by the rules and regulations submitted by the railway company to the Interstate Commerce Commission, and when said rules and regulations are approved by said commission, and published by the railway, that the same becomes the law under which plaintiff must recover or fail to recover," the error being that, under the pleadings and the undisputed evidence in the case, the liability of the defendant, either as carrier or as warehouseman, the said goods not having been delivered to the consignee, was exclusively controlled by the Act to regulate commerce
100 and the Acts amendatory and supplementary thereof.

4. Excepts because the presiding Judge refused to charge the defendant's fifth request, which was as follows: "5. That if the

jury find from the evidence that the plaintiff had knowledge that his freight had arrived and was ready for delivery, that he must remove the same within a reasonable time," the error being that it was his duty to do so, and if he failed to perform his duty then he was guilty of negligence which directly contributed to his loss, and in such case the defendant would not be liable except for gross, reckless or wilful negligence.

5. Excepts because the presiding Judge refused to charge the defendant's eighth request, which was as follows: "8. That if a bill of lading was issued to the plaintiff and he or those authorized to act for him signed the same, whether he or they read the same or not, the plaintiff and defendant are bound by the conditions of the said bill of lading," the error being because whatever was in the bill of lading not in conflict with the Acts of Congress or the rules and regulations filed with the Interstate Commerce Commission and published, was binding upon all the parties, and it was error not to so declare.

6. Excepts because the presiding Judge (it appearing that by the pleadings and the evidence uncontradicted that this was an interstate shipment of goods and that the goods had not been delivered and therefore had not ceased to be interstate commerce under the definition of the Act of Congress to regulate commerce and the Acts amendatory thereof) should have charged upon the bill of lading issued, and it appearing that said shipment of goods was lost by destruction of the defendant's depot by fire, that the same was not caused by defendant, as provided in the Carmack Amendment to said Act to regulate commerce, and that before the defendant could
101 be held liable the plaintiff must show that such fire was caused by it and thereby his goods were lost.

7. Because the Circuit Judge erred in not directing a verdict or granting a nonsuit upon the grounds as set out in the motion for the same.

8. Because the Circuit Judge erred in not setting aside the verdict and granting a new trial upon the grounds set out in the motion for same.

9. Because the Circuit Judge erred in not holding that the verdict was against the greater weight and preponderance of the testimony.

102 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Eleventh Circuit, Edgefield County.

No. 130.

W. E. PRESCOTT, Plaintiff-Respondent,
against
SOUTHERN RAILWAY COMPANY, Defendant-Appellant.

Opinion by T. B. Fraser, A. J.

This is an action against the defendant for loss by fire of certain boxes of shoes while in the defendant's possession. Thirteen boxes

of shoes were shipped from Petersburg, Virginia, to the plaintiff at Edgefield, S. C. They arrived in Edgefield on the 23rd day of June, 1913. On the following day the plaintiff's agent called at the depot for freight and, on account of the crowded condition of his wagon, took only four boxes. Plaintiff's agent paid the freight on all but left nine boxes in the possession of the defendant to be called for later. On the morning of the 4th of July following, the Warehouse of the Defendant, with its contents, including the shoes, burned down. The plaintiff demanded payment for the loss which was refused. The plaintiff then brought this suit alleging three causes of action. The first cause of action was against the defendant as common carrier; the second as warehouseman and the third was for the penalty for non-payment. Judgment was for the plaintiff and the defendant appealed.

There are several exceptions, but the appellant argues but two questions.

1. The defendant claims that in as much as this is an interstate shipment, the Federal Statute governs. This question does not legitimately arise in this case for the reason that the Appellant moved for a non suit on the ground that "the evidence here shows
that this freight arrived here on the 23rd of June and that
103 the freight was paid and receipted for by the agent of Dr.
Prescott. He came for it and paid the freight and I submit that where a common carrier delivers freight in good order and has it in its depot and paid for then its liability as common carrier ceases." The Court reserved its decision on that question and before it was announced, the plaintiff withdrew the cause of action as common carrier and also the cause of action for the penalty. It therefore being conceded in the Circuit Court that the contract of carriage was ended and the appellant held the goods by a separate contract, the question as to Appellant's liability as common carrier and the Federal Statute under which it might have arisen is not before this Court and the only question argued which we can consider is the question as to warehouseman.

2. The general rule as to the liability of warehouseman in this State is clear. When the plaintiff shows that he has delivered his goods to a warehouseman and that he can't get them back, the warehouseman must account for the loss. That it is not enough to relieve the warehouseman for him to show that the loss was by fire, he must show the circumstances surrounding the fire. (See Brunson vs. Ry., 76 S. C., 9; Fleischman vs. Ry., 76 S. C., 237.) The difficulty in this case is that the complaint made no separate general allegation of negligence but undertook to state the particulars in which the defendant was negligent. The trial judge charged that there was a presumption of negligence and the plaintiff was not required to prove any of the acts of negligence specified in the complaint. The appellant contends that this is error. That while the plaintiff might have made and rested upon a general allegation of negligence, yet, when the plaintiff undertook to specify the acts of negligence, then the plaintiff was confined to his specification of negligence alleged.

In the case of Sutton vs. Ry. 82 S. C., p'g's 347-349, this Court says, that where a complaint is allowed to stand in which there are general allegations of negligence, then any evidence of neg-
104 ligence will be received, but where specific acts of negligence are alleged, the specific act must be proved. The rule in that case was held not to apply to a passenger, because there is a presumption of negligence from injury to a passenger from an instrumentality of the carrier, and that presumption cast upon the carrier the burden of showing due care, even though there was a failure to prove the specifications alleged.

This objection can not be sustained and the Judgment is Affirmed.

We concur:

EUGENE B. GARY, *C. J.*
D. E. HYDRICK, *A. J.*
R. C. WATTS, *A. J.*
GEO. W. GAGE, *A. J.*

A true copy.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS, *Clerk.*

105 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
against
W. E. PRESCOTT, Defendant in Error.

Know all men by these presents: That we, Southern Railway Company, a corporation of the State of Virginia, as principal, and The United States Fidelity & Guaranty Company, a corporation of the State of Maryland, as surety, are held and securely bound unto the above named W. E. Prescott in the sum of five hundred and no/100 ($500.00) dollars, to be paid to him and for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dat*h*ed the 22nd day of December, in the year of our Lord one thousand nine hundred and fourteen.

Whereas, the above named Southern Railway Company, Plaintiff in error, seeks to prosecute its writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of South Carolina,

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged

if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and virtue.

SOUTHERN RAILWAY COMPANY, [L. S.]
By N. G. EVANS, *Its Attorney.*
THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By A. W. BOLLIN,
By ROBT MORMAN,
Attorneys in Fact.

Witness:
As to Southern Railway Co.:
G. C. DISMUKES.
As to U. S. F. & G. Co.:
G. C. DISMUKES.

A true copy.
[Seal Supreme Court of South Carolina.]
U. R. BROOKS, *Clerk.*

The bond appearing on the foregoing page approved this 22nd day of December, A. D. 1914, and to operate as a supersedeas.

EUGENE B. GARY,
Chief Justice of the Supreme Court of the State of South Carolina.

106 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court, before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between W. E. Prescott and Southern Railway Company, a corporation, wherein was drawn in question the construction of a clause of the Constitution, and a statute of the United States, and the decision was against the title, right, privilege or immunity specially set up or claimed under such clause of the said Constitution and the said statute; a manifest error hath happened, to the great damage of the said Southern Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court

of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, D. C., within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of
107 the Supreme Court of the United States, the 28 day of December, in the year of our Lord one thousand nine hundred and fourteen.

[Seal United States District Court, Eastern District So. Ca.]

RICH'D W. HUTSON,
Clerk District Court of the United States,
District of South Carolina.

Allowed:

EUGENE B. GARY,
Chief Justice of the Supreme Court of
South Carolina.

108 [Endorsed:] The State of South Carolina, County of ——. In the Supreme Court. W. E. Prescott, Plaintiff, against Southern Railway Company, Defendant. Writ of Error. N. G. Evans, Attorneys for Southern Railway Co., Columbia, S. C. Filed Supreme Court of S. C. Dec. 29, 1914. U. R. Brooks, clerk.

109 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

W. E. PRESCOTT, Plaintiff,
against
SOUTHERN RAILWAY COMPANY, Defendant.

Petition for Writ of Error.

Southern Railway Company, the above named defendant, respectfully shows that on the 28th day of September, A. D., 1914, the Supreme Court of South Carolina, which is the highest Court in the State which could render a decision in the action referred to herein, rendered a judgment against your petition- in a certain action in which W. E. Prescott was plaintiff, and your petitioner was defendant.

In said action a right, privilege and immunity was duly and specially set up and claimed by your petitioner under the Constitution and under a statute of the United States; and the decision of the Supreme Court of South Carolina was against the right, privilege and immunity so set up and claimed, all of which will more fully and in more detail appear from the assignment of errors filed herewith.

Wherefore and inasmuch as your petitioner feels aggrieved by

the final decision of the Supreme Court of South Carolina in rendering the judgment against it in this action, it respectfully prays that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of South Carolina for the correcting of the error complained of; that an order may be entered fixing the amount of the supersedeas bond herein; that a duly authenticated transcript of the record of the proceedings herein in said Supreme Court of South Carolina be sent to the Supreme Court of the United States; and that the decision and judgment of the Supreme Court of South Carolina herein may be reversed and annulled.

——— ———,
Attorney for Southern Ry. Co.

110 STATE OF SOUTH CAROLINA,
Supreme Court:

I let the writ of error above prayed for issue upon the execution of a bond by Southern Railway Company, payable to W. E. Prescott, in the sum of five hundred dollars, such bond, when approved, to act as a supersedeas.

EUGENE B. GARY,
Chief Justice of the Supreme Court of South Carolina.

December 22, 1914.

111 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

W. E. PRESCOTT, Plaintiff,
against
SOUTHERN RAILWAY COMPANY, Defendant.

Assignment of Errors and Prayer for Reversal.

Now comes Southern Railway Company, the above named defendant, and files herewith its petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment:

This is an action against the defendant for loss by fire of certain boxes of shoes while in the defendant's possession. Thirteen boxes of shoes were shipped from Petersburg, Virginia, to the plaintiff at Edgefield, S. C. They arrived in Edgefield on the 23rd day of June, 1913, and on the following day the plaintiff's agent called at the depot for freight and, on account of the crowded condition of his wagon, took only four boxes. Plaintiff's agent paid the freight on all but left nine boxes in the possession of the defendant to be called for later. On the morning of the 4th of July follow-

ing, the warehouse of the defendant, with its contents, including the shoes, burned down. The plaintiff then brought this suit alleging three causes of action. The first cause of action was against the defendant as common carrier, the second as warehouseman, and the third was for the penalty for non-payment. Judgment was for the plaintiff, and the defendant appealed to the Supreme Court of the State, in which Court a final decision was rendered affirming said judgment.

Southern Railway Company, defendant, respectfully assigns as errors in the record and proceedings in this cause, in the Supreme Court of South Carolina, the following:

112 *Exceptions.*

1. Although the Supreme Court of the State held that the question as to appellant's liability as a common carrier and under which statute it might have arisen was not before it, the only question argued which the Court could consider was the question of warehouseman, yet such Court necessarily decided the Federal question adversely to the defendant that the rule of such liability, and the privileges and rights of the plaintiff were not regulated by the Constitution of the United States and the Act of Congress made in pursuance thereof, and in so holding the State Supreme Court erred; that such statutes do extend to and involve a case where an interstate shipment, as in this case, was placed in the Company's warehouse, part of the goods being delivered and the remaining part being burned up.

2. That the Supreme Court of South Carolina erred in not holding that the mere fact of storing the goods and keeping them for future delivery did not destroy the applicability of the Act to Regulate Commerce and its amendments, for under such Act and its amendments not only the transportation over the line is covered, but that of storage.

3. That the Supreme Court of the State erred in not according to the defendant the right and privilege which it could claim under said Acts to have the law as laid down in the Federal decisions made applicable to the case, instead of charging the law with regard to the burden of proof as construed to have been determined by the decisions of the Supreme Court of the State, and should have held that the burden of proof of negligence was on the plaintiff, and the proof merely of the loss of the goods by fire was not sufficient to put the defendant on its defense.

Wherefore, for these, and other manifest errors, appearing in the record, the said Southern Railway Company, defendants, pray that this judgment of the Supreme Court of South Carolina herein,

113 dated September 24, 1914, be reversed, set aside and held for naught, and that a judgment be rendered for the defendant company granting its rights under the Constitution and statutes of the United States, and the defendant also prays for a judgment for costs in its favor.

N. G. EVANS,
Attorney for Southern Railway Company.

114 [Endorsed:] The State of South Carolina, County of ——.
In the Supreme Court. W. E. Prescott, plaintiff against Southern Railway Company, defendant. Petition for Writ of Error, Allowance Thereof, and Assignment of Errors. N. G. Evans, Attorneys for Southern Railway Co., Columbia, S. C. Filed Supreme Court of S. C. 29 Dec. 1914. U. R. Brooks, clerk.

115 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to W. E. Prescott, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of South Carolina, wherein Southern Railway Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of South Carolina, this 29. day of December, 1914.

EUGENE B. GARY,
Chief Justice of the Supreme Court of the State of South Carolina.

Attest:

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk of the Supreme Court of the State of South Carolina.

STATE OF SOUTH CAROLINA,
County of Edgefield:

I, the undersigned attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance for said defendant in error in the Supreme Court of the United States.

J. WM. THURMOND,
Attorney for W. E. Prescott.

Jan. 1st, 1915.

116 [Endorsed:] The State of South Carolina, County of ——.
In the Supreme Court. W. E. Prescott, plaintiff against Southern Railway Company, defendant. Citation. N. G. Evans, Attorneys for Southern Railway Co., Columbia, S. C.

Endorsed on cover: File No. 24,570. South Carolina Supreme Court. Term No. 358. Southern Railway Company, plaintiff in error, vs. W. E. Prescott. Filed February 20th, 1915. File No. 24,570.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 826.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

versus

W. E. PRESCOTT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

BRIEF FOR THE PLAINTIFF IN ERROR HEARING ON SUMMARY DOCKET.

BENJAMIN L. ABNEY AND FRANK G. TOMPKINS,
ATTORNEYS FOR PLAINTIFF IN ERROR.

Statement of Plaintiff in Error.

The Writ of Error asks a review of the judgment of the Supreme Court of South Carolina, filed September 28th, 1914, affirming a judgment of the Court of Common Pleas for Edgefield County, in which judgment had been entered under the verdict, in favor of the defendant in error.

It appears that a shipment of thirteen boxes of shoes was made over the Southern Railway, from Petersburg, Va., to Edgefield, S. C., consigned to the defendant in error, which shipment arrived at Edgefield on the 23rd day of June, 1913. The shipment moved under a special rate, which made it subject to the Bill of Lading. (Record, page 40.) The agent immediately mailed a postal card to the consignee (record, pages 41-42), which card contained notice that demurrage and storage would be

assessed at the expiration of the free time, 48 hours, provided by the rules of the Company, and that the property would be held only as warehouseman, while it was in their possession, and the same would be at the owner's risk of loss by fire (record, page 69).

On the day after the arrival of the shipment, a son of the consignee called at the depot of the plaintiff in error for certain freight which might be there for him, and found the shipment of shoes had arrived. Not being able to carry the whole shipment with him at that time, he paid the freight on it, carried away four boxes, and asked the agent to keep the balance of the shipment until he could return; he expecting at that time to pay storage, though he made no contract with reference to it. (Record, page 30). The consignee did not pay storage on this shipment, but had paid on others. (Record, page 36). He considered this shipment was destroyed by fire while in transit on said Southern Railway Company. (Record, page 64). Neither the defendant in error, nor any one for him, subsequently called for the balance of said boxes of shoes. On the 4th day of July, 1913, the freight house or store room of the plaintiff in error, with all its contents, including said shipment, was destroyed by fire. The defendant in error demanded payment for the loss, claiming that the goods had been destroyed while in transit on said Southern Railway (record, page 64), and, after a refusal to pay, the plaintiff in error brought this suit on three causes of action in the Court of Common Pleas for Edgefield County (record, pages 1 to 6 inclusive).

The answer of the plaintiff in error set up, after a general denial of the allegations, of the complaint, that the plaintiff in error was a railroad engaged in interstate commerce, within the provisions of the Act of Congress to regulate interstate commerce and amendments and supplements thereto controlling and governing interstate railroads; and that the shipment in question was an interstate shipment, and should be governed by the Act of Congress

of 1887, and various amendments and supplements thereto. (Record, page 7.)

At the close of the case for the defendant in error the plaintiff in error moved for a nonsuit or direction of verdict, and the following colloquy and ruling occurred:

> "Mr. Evans: We ask your Honor for a nonsuit or the direction of a verdict under the first count in the complaint as to common carrier. The evidence here shows that the freight arrived here on the 23rd of June, and that the freight was paid and receipted for by the agent of Dr. Prescott. He came for it and paid the freight; and I submit that where a common carrier delivers freight in good order, and has it in his depot and paid for, then its liability as a common carrier ceases.
>
> "And further, there is no evidence going to show negligence, from which the jury could infer negligence as set out in the complaint.
>
> "The Court: You are on the first count?
>
> "Mr. Evans: Yes, sir, that they are liable as insurers.
>
> "The Court: And they can only be relieved from that by an act of God or a public enemy.
>
> "Mr. Evans: I see the grounds of negligence in the warehouse transaction are set out in the first cause of action and as common carrier; they are both the same, exactly.
>
> "Mr. Thurmond: There is no negligence in the first cause of action at all.
>
> "Mr. Evans: We ask your Honor for a nonsuit on the whole business. There is no testimony to show that they are liable as a common carrier.
>
> "The Court: We will wait until the testimony is all in; you know when you are on actions of this kind, the Supreme Court looks for a scintilla, and that is a very small thing; when the testimony is all in I will give my decision as to directing a verdict. Go ahead."

At the close of the case the attorney for the defendant in error withdrew his cause of action against the plaintiff in error as a common carrier, and also his cause of action for the penalty and asked for judgment on the alleged cause of action against the plaintiff in error as warehouseman, at which time the following argument and ruling occurred:

"Mr. Thurmond: The plaintiff withdraws his cause of action against the defendant as a common carrier and withdraws his cause of action against the defendant for the penalty and the case proceeded to trial only on the cause of action against the defendant as a warehouseman.

"Mr. Evans: We will ask for a verdict on the other, as he has withdrawn the actions for the penalty and as common carrier.

"The Court: It is on the question of a warehouseman.

"Mr. Evans: We take the position that under the Interstate Commerce Commission Rules, as adopted and published by the railroads, that the bill of lading which my friend has introduced in evidence, we are entitled to have the action as to the warehouseman dismissed; we think we are entitled to have your Honor instruct the jury that the contract between Dr. Prescott and the railroad company, as contained in this bill of lading, is the law. The bill of lading was the contract under which the railroad accepted this freight. We take the position that the bill of lading is the law and the contract in this case, and that we are entitled to a verdict.

"The Court (after hearing arguments): Go to the jury, gentlemen."

At the close of the arguments the Presiding Judge delivered a charge in which he held that the case was not controlled by the Federal Statute or the Federal laws (record, page 70).

After a verdict for the defendant in error, the attorney for the plaintiff in error moved for a new trial on the ground that the Court had held that there was no Federal question raised in the case, and that the burden was on the defendant in error to prove that there was no negligence on his part in the loss of the goods; whereas, the burden of proof under the Federal Act was on the defendant in error to prove negligence on the part of the carrier before he could recover, and there had been no such negligence shown. The trial judge admitted that he had charged the jury that the Federal decisions and Statute were not binding; that he was trying the case under the South Carolina decisions, and if there was a Federal question involved he would be reversed. (Record, pages 72-73.)

After entry of judgment the case was appealed to the Supreme Court of South Carolina, and an opinion was rendered affirming the judgment of the court below.

The exceptions on that appeal, raising, among other points, the question as to whether the liability should have been determined according to the Federal Statutes and the rules of the common law obtaining in the Federal Courts, which right was claimed by the appellant. In the opinion of the said Supreme Court of South Carolina, the facts were found substantially as they have been stated here, but the Court held that the attorney for the plaintiff in error had conceded that the contract which prevented the liability of plaintiff in error as a common carrier or warehouseman under the Federal Statute from being construed by that Court in the following words:

> "The defendant claims that in as much as this is an interstate shipment, the Federal Statute governs. This question does not legitimately arise in this case for the reason that the appellant moved for a nonsuit on the ground that 'the evidence here shows that this freight arrived here on the 23rd day of June, and that the freight was paid and receipted for by the agent of Dr. Prescott. He came for it and paid the freight, and I submit that where a common carrier delivers freight in good order, and has it in its depot and paid for, then its liability as common carrier ceases.' The Court reserved its decision on that question; and before it was announced, the plaintiff withdrew the cause of action against the defendant as common carrier, and also the cause of action for the penalty. It, therefore, being conceded in the Circuit Court that the contract of carriage was ended, and the appellant held the goods by a separate contract, the question as to appellant's liability as common carrier and the Federal Statute, under which it might have arisen, is not before this Court, and the only question argued which we can consider is the question as to warehouseman."

The Presiding Judge charged the jury as follows:

> "It is for you to say whether the railroad company was negligent, and they must show to your satisfaction that

they were not negligent; that precautions were taken and all that sort of thing."

(Record, p. 71.) Which charge was made the basis of the plaintiff in error's first exception. See Record, p. 73, which charge seems to have been affirmed by the Supreme Court of South Carolina. See 99 S. C., at page 411."

After the decision of the Supreme Court of South Carolina, the case was regularly brought to this Court by writ of error, where it is now pending.

Notice of motion to dismiss, affirm or place on the summary docket, was made, and, in consequence of that motion, the cause was placed on the summary docket for a hearing.

SPECIFICATIONS OF ERROR.

SPECIFICATION ONE.

Error of the State Court in holding that appellant's liability as a common carrier, under any Federal Statute which it might have arisen, was not before the Court, and there was no Federal question raised in this case which would require a different rule for the determination of the liability of plaintiff in error (defendant below), in the following language:

1. "The defendant claims that in as much as this is an interstate shipment, the Federal Statute governs. This question does not legitimately arise in this case for the reason that the appellant moved for a nonsuit on the ground that 'the evidence here shows that this freight arrived here on the 23d of June, and that the freight was paid and receipted for by the agent of Dr. Prescott. He came for it and paid the freight, and I submit that where a common carrier delivers freight in good order and has it in its depot and paid for, then its liability as common carrier ceases.' The Court reserved its decision on that question, and before it was announced the plaintiff withdrew the cause of action as common carrier and also the

cause of action for the penalty. It therefore being conceded in the Circuit Court that the contract of carriage was ended and the appellant held the goods by a separate contract, the question as to appellant's liability as common carrier and the Federal Statute under which it might have arisen is not before this Court, and the only question argued which we can consider is the question as to warehouseman." (Assignment 1, R, page 81.)

SPECIFICATION TWO.

Error of the State Supreme Court in not holding that the mere fact of storing the goods and keeping them for future delivery did not destroy the applicability of the Act to Regulate Commerce and its amendments not only the transportation over the line is covered, but that of storage. (R., page 81, assignment 2.)

SPECIFICATION THREE.

Error of the Supreme Court in not according to the defendant the right and privilege which it could claim under said Acts to have the law laid down in the Federal decisions made applicable to the case, instead of charging the law with regard to the burden of proof as construed to have been determined by the decisions of the Supreme Court of the State, and, in that the said Supreme Court should have held that the burden of proof of negligence was on the plaintiff, and the proof merely of loss of goods by fire was not sufficient to put the defendant on its defense; and, in that the presiding judge refused to charge the requests submitted by the plaintiff in error, which are as follows:

IV. "That the shipment of freight from one State to another is an interstate shipment and governed and controlled by the rules and regulations submitted by the railway company to the Interstate Commerce Commission,

and when said rules and regulations are approved by said commission, and published by the railway, that the same becomes the law under which plaintiff must recover or fail to recover."

V. "That if the jury find from the evidence that the plaintiff had knowledge that his freight had arrived and was ready for delivery, that he must remove the same within a reasonable time."

VIII. "That if a bill of lading was issued to the plaintiff and he or those authorized to act for him signed the same, whether he or they read the same or not, the plaintiff and defendant are bound by the conditions of the said bill of lading."

And in that his Honor, the Presiding Judge, charged the jury as follows:

"When goods transported by a railway company arrive at their destination, its liability as a common carrier continues until the consignee has a reasonable time within which to remove them. That is eliminated from this case. But even after the lapse of a reasonable time after its liability as a common carrier has ceased to exist, it is nevertheless liable, by operation of law, as a warehouseman, although the goods may not have been unloaded and deposited in its warehouse used for storing freight, technically termed a warehouse. Until a reasonable time has elapsed after the arrival the common carrier,—but that part as to the common carrier has been eliminated. But after that time it is only bound as a warehouseman to exercise ordinary care. As a warehouseman the railroad company has the right to exact storage charges as long as such relation exists in the particular case, and until it ceases to be a warehouseman its liability for ordinary negligence continues.

"The fact that it has the right as a warehouseman to collect storage charges makes it a bailee for hire, and prevents it from claiming that it was merely a gratuitous bailee, at least before it gives notice that it will not insist upon such charges, and will not longer hold possession of the property as a warehouseman.

"Now, what relation existed between these parties,—the plaintiff and defendant—relative to the nine cases of shoes which it is alleged were destroyed? Was it that of a warehouseman? Did the company have the right at the

time of the destruction of the property to charge for storage? If so, then they are warehousemen, and they must exercise ordinary care; and if they failed to exercise ordinary care, they are guilty of negligence, and if that negligence was the direct and proximate cause of the loss, they are liable; but if the relation of warehouseman had been severed, then the relation of gratuitous bailee arises, and the railroad company is only required to exercise slight care, consequently it is liable in case of gross negligence. Slight care means that you exercise such a degree of care as an indifferent man would have exercised. You have heard the facts and circumstances of this case. It is for you to say whether the railroad company was negligent, and they must show to your satisfaction that they were not negligent; what precautions were taken, and all that sort of thing." (Assignment 3, R. page 81.)

ARGUMENT.

The assignments in error, filed herein, are three in number (record, pages 80-81), but they all support the one point, that the State Courts, both Circuit and Supreme, erred in finding and holding that the case should not have been tried and governed by the Statutes of the United States and the decisions of this Court.

There is no question but that this was an interstate shipment, and that the goods for which the defendant in error was suing had not been delivered to the consignee. In view, however, of the finding of the Supreme Court of the State of South Carolina that

> "The question of what law governed in the trial of the case did not legitimately arise, for the reason that the appellant moved for a nonsuit on the ground that 'the evidence here shows that this freight arrived here on the 23d of June and that the freight was paid and receipted for by the agent of Dr. Prescott. He came for it and paid the freight, and I submit that where a common carrier delivers freight in good order, and has it in his depot and paid for, then its liability as a common carrier ceases.' The Court reserved its decision on that question, and before it was announced the plaintiff withdrew the cause

of action as common carrier, and also the cause of action for the penalty. It therefore being conceded in the Circuit Court that the contract of carriage was ended and that the appellant held the goods by a separate contract, the question as to appellant's liability as common carrier and the Federal Statute under which it might have arisen, is not before this Court, and the only question argued which we can consider is the question as to warehouseman."

We find it necessary to discuss the following question:

WAS THE FEDERAL QUESTION PROPERLY BEFORE THE STATE SUPREME COURT FOR DETERMINATION?

It will be recalled from the statement of facts herein that the Federal question was raised,

First. In the answer to the complaint filed by the plaintiff in error (record, page 7).

Second. On motion for nonsuit (record, page 39).

Third. On motion for direction of verdict (record, page 70.)

Fourth. In the requests to charge submitted to the trial Judge by the plaintiff in error, which were refused (record, page 72).

Fifth. On motion for a new trial (record, page 72).

Sixth. In the exceptions on appeal to the Supreme Court (record, page 73).

The plaintiff in error introduced in evidence the straight bill of lading under which this shipment moved (record, page 67), which was signed by the agent of the Company and the shippers, whom the consignee said were acting for him in the matter.

That bill of lading, on its face, just above the signature of the shipper, contained the following clause:

"Receive, carry and deliver the articles above, subject to the conditions on the face and back hereof, all of which we agree to."

On the back of the same, under the head of "Conditions," is the following:

> "Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot or place of delivery of the carrier or warehouse, subject to reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of owner, and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

The freight bill in evidence (record, page 65), and signed by the shippers on the last line of the front page, contains the following:

> "Demurrage and storage will be assessed at the expiration of the free time provided by the rules of this company."

The defendant, in his affidavit attached to his claim for damage herein (record, page 64), claims that he had a just debt against the Southern Railway "by reason of the damage or destruction of the said property by fire while in transit on said railway depot at Edgefield, South Carolina."

The evidence of R. B. Arthur, a commercial agent at Augusta, Ga. (record, page 40), is as follows:

> "Q. We offer this in evidence. (Exhibit No. 2.)
>
> "Q. This, a certificate of the Interstate Commerce Commission, is the freight rate rules? A. Yes, sir.
>
> "Q. Read that rule? A. 'The reduced rates specified in this classification will apply on property shipped subject to the conditions of the carrier's bill of lading will be at the carrier's liability, limited only as provided by common law and by the laws of the United States and of the several States, in so far as they apply. Property thus

carried will be charged ten (10) per cent. higher (subject to minimum increase of one (1) per cent. per hundred pounds) than if shipped subject to the conditions of the carrier's bill of lading.'

"Q. How were those goods shipped? A. They were shipped released, subject to the bill of lading.

"Q. What do you mean by released? A. It is a railway rate specified in the bill of lading; if it is goods that the shipper wants to specify some value on, and do not want to ship them under the conditions of the bill of lading, he is charged ten per cent. higher; if he wants to put other conditions than in the bill of lading he would have to pay ten per cent. higher.

"Q. It was shipped under the rule that makes the bill of lading the contract between the parties? A. Yes, sir.

"Q. Has that rule been filed with the railroad offices? A. Yes, sir, in every office in this country; it is filed with the Interstate Commerce Commission at Washington."

This testimony was supported by the certificate of the Interstate Commerce Commission in evidence, as Exhibit 2, pages 66-67-68-69.

In addition to this, the postal card sent to the defendant in error showed that storage would be charged (record, page 69), and the defendant in error and his son, who was acting as agent for him in paying the freight and removing such parts of the shipment as had been removed, both understood that they were to pay storage, though nothing was mentioned about it in the conversations with the agent. (Record, pages 30-36.)

It will thus be seen that the shipment was sent from the State of Virginia to the State of South Carolina, under a bill of lading which provided that after the property had arrived at its destination forty-eight hours the carrier would be liable only as a warehouseman, and storage charges would be made for that service.

There was no evidence that any other contract was made or could have been made with reference to the shipment from the time that it was received by the railway company until it was destroyed by fire, while in their possession, some ten or twelve days after its arrival at its destination,

and notification, both by letter and personally, had been promptly made to the consignee and his agent.

The motion for a nonsuit in which the expressions of the trial attorney's opinion as to the law in the case was construed by the Supreme Court into a concession, that there was no Federal question in the case, does not support the finding made by the said Supreme Court. As it will be clearly seen, not only from the fact that the attorney, at every point in the case where he had the opportunity, insisted that the Federal laws did control, and that there was a Federal question, which would govern the rule of decision, but the words themselves, on which the learned Justice based his conclusions, did not warrant it.

It will be observed that the remarks above mentioned were made on motion for a nonsuit with reference to two causes of action, which were withdrawn by the attorney for the defendant in error, and even if, by a strained construction, they could be made to mean what the State Supreme Court has found that they meant, it would have been nothing more than an expression of the attorney as to what the law was, and could not have operated as a concession which would deprive him of the right then or thereafter to claim that the law was to the contrary.

The case of the *United States of America vs. Hamburg American Co.*, 239 U. S., 467, in discussing the question of agreements by attorneys as affecting the jurisdiction of the court, affirmed the rule stated by *California vs. San Pablo & Tulare R. R.*, 149 U. S., 308, 314, in the following words:

> "The duty of this Court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the Court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in

the case before it. No stipulation of parties or counsel, whether in the case before the Court or in any other case, can enlarge the power or affect the duty of the Court in this regard."

Citing in support thereof:

Lord vs. Veazie, 8 How., 251.
Cheong Ah Moy vs. United States, 113, U. S., 216,
Little vs. Bowers, 134 U. S., 547.
Jones vs. Montague, 194 U. S., 147.
Security Life Insurance Co. vs. Prewitt, 200 U. S., 446.
Richardson vs. McChesney, 218 U. S., 487.
Stearns vs. Wood, 236 U. S., 75.

SECTION II.

2. Ruling Case Law, at page 990, is as follows:

"Admissions of facts made by an attorney, in the progress of a case, are usually held binding on his client, provided such admissions are distinct and formal and made for the express purpose of dispensing with formal proof of such facts at the trial . . .; and a stipulation or admission by counsel, as to a matter of law, has, however, been held to be of no effect."

To the same effect see *Mitchell vs. Cotton*, 3 Fla., 134; *Holmes vs. Johnson*, 12 Heisk., 155.

The above cases are recognized in a note by Judge Freeman, where he approves of this principle in 132 Am. St. Rep., at page 159.

As bearing on this subject and showing that an erroneous statement of a legal position is not binding, it has been held that:

"requests by both parties for peremptory instructions in their favor doesn't amount to a submission of the facts to the Court so as to exclude the right of the plaintiff to have the case go to the jury in accordance with subsequent special requests asked in their behalf."

Empire St. Cattle Co. vs. Atchison T. & R. Co., 210 U. S., 1, 52 L. Ed., 931.

To the same effect it has been held that:

> "A demurrer to the bill only admits the facts well pleaded in such bill, and does not admit the pleaders' conclusions of law, nor the correctness of any opinion set forth therein."

Equitable Life Assurance Society of the United States vs. Brown, 213 U. S., 25, 58 Law. Ed., 682.

The point seemed to have been overlooked by the learned Justice who wrote the opinion in the State Supreme Court, that the storage was provided for in the contract of carriage, and the only obligation which could have arisen between the parties for storage was by reason of and in consequence of the bill of lading, and while the contract, as a common carrier, had changed to that of a warehouseman, by reason of the terms of the bill of lading agreed to by both parties and made valid in all of its terms, by reason of the reduced rate on which the goods were being shipped, it was, nevertheless, governed by the Federal Statutes and the Federal laws, because there had never been such a delivery as would have ended the mutual obligations of the contract.

After it is found by this Court that the Federal question was properly raised and was before the State Supreme Court, the assignments of error are all contained in the one question:

Did the rules of the Federal Statutes and Federal decisions cease to govern the liability of the carrier to the consignee?

Under the Federal Statute and the United States Supreme Court decisions, construing the same, the burden of proof of negligence and failure to deliver rests throughout, in the trial had for recovery, upon the consignee and not upon the carrier as warehouseman; and all Acts and decisions of any State Court regarding any different or other liability have been superseded by the Federal Statutes and decisions.

See *C. & W. C. R. R. C. vs. Varnville Furniture Co.*, 237 U. S., 597, confirming *Boston & M. R. Co. vs Hooper*, 233 U. S., 97, where it is said:

> "The special regulations and policies of particular States upon the subject of the carrier's liability for loss or damage to interstate shipments and the contracts of carriers with respect thereto have been superseded," and "when Congress has taken the particular subject matter in hand, coincidents are as ineffective as opposition, and a State law is not to be declared a help because it attempts to go further than Congress has seen fit to go."

It can not be claimed that there had, in this case, been any actual delivery in the sense that interstate commerce had ceased.

Section 1 of the Interstate Commerce Act, as amended by Act of June, 1906, includes acts done after the arrival of the goods and after the liability becomes one of warehouseman, for it specifically provides for storage charges, and the bill of lading and other records in evidence refer to it. There being no actual delivery in this case, the Federal law still applies, and it retains the character of an interstate shipment, and even though the shipment had been placed in the carrier's warehouse for delivery to the consignee, there must have been an actual delivery and parting with the custody of the property before such an arrival had taken place as would take from the shipment its interstate character. See *Paul Heyman vs. Southern Railway Company*, 203 U. S., page 271, and this would not be effective even though the agent consented to keep the shipment after its arrival.

See *Adams Express Company vs. Kentucky*, 206 U. S., 136, 51 L. Ed., 991, where it is said:

> "The Court held that, by reason of the retention of the package by the agent, the company ceased to hold it as carrier, and had become a mere bailee or warehouseman; that, therefore, the statute, as applied to the transaction, was not a regulation of commerce; and, further, that, as Meece had not ordered the whiskey, there was no con-

tract for the sale of it in Cincinnati, but only by the company at East Bernstadt, in Kentucky; that while there was no testimony showing that the company's agent at Cincinnati knew that the whiskey had not been ordered by Meece, yet its agent in Kentucky was so informed, and, therefore, the company was possessed, through its agent, of knowledge that there was no interstate transaction, and, with that knowledge, sold the whiskey to Meece. But that the agent consented to hold the whiskey until Saturday did not destroy the character of the transaction as one of interstate commerce is settled by the recent case of *Heymann vs. Southern Railway Co.*, 203 U. S., 270, *ante*, 178, 27 Sup. Ct. Rep., 104. In that case whiskey had been forwarded to a party in Charleston, South Carolina, and after its arrival at Charleston, was placed in the warehouse of the railroad company by its agent, and there seized by constables, asserting their right so to do under the Dispensary law of South Carolina. The point was made and sustained by the Supreme Court of the State of Georgia, in which State an action had been brought against the company for the value of the goods, that when the goods were placed in the warehouse the carrier was thenceforward liable only as a warehouseman."

By reference to the Interstate Commerce Act, Section 1, and the proviso thereto, both of which are appended hereto, it appears that the same reference, not only to the transportation, but to the receiving, delivering, storage or handling of the property, even though it might be held that the carrier in this case, by reason of the facts set out above, held the property of the consignee as a warehouseman, it is nevertheless true that his holding of the property as such was still governed by the Interstate Commerce Act, especially in view of the fact that the bill of lading provided that it should be held as a warehouseman under circumstances similar to this of the case at bar, and all acts of the parties to the transaction tended to show that the holding was a mere incidence of the contract of carriage.

This principle has been recently held in a case very similar to the one at bar, by this Court in *C. C. & St. L. Rail-*

way Co. vs. Dettlebach, decided January 10, 1916, and reported at 239 U. S., page 588. The facts are as follows:

"Dettlebach, the plaintiff, on September 18, 1911, shipped certain packages of merchandise, described as household goods, over the Chicago, Burlington & Quincy Railway and connecting lines, from Denver, Colorado, consigned to his wife at Cleveland, Ohio. They were received for transportation under the terms of a bill of lading, prepared in the form approved and recommended by the Interstate Commerce Commission, in its report of June 27th, 1908 (14 I. C. C., 346, 352; 22 Annl. Rep. I. C. C., 1908, p. 57), which contained the following provision:

> "It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, *that every service to be performed hereunder* shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his assigns."

On the conditions printed upon the back were the following:

> "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property . . . at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence . . ."
>
> "Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given, may be kept in car, depot or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only . . .."
>
> "Upon the face of the bill of lading was the following

declaration signed by plaintiff's agent: 'I hereby declare the valuation of the property shipped under this bill of lading does not exceed $10.00 per cwt.'"

"The Court found as a fact that the shipper, by consenting to the limitation, received a consideration in the shape of a substantial reduction in the freight rate, and that this supported the agreement to limit the company's liability. No question was made but that the agreement was in accordance with the filed tariff.

"The goods thus shipped were transported by the initial carrier to the junction between its line and that of defendant, and transported by the latter company to destination, where they arrived on September 27th. They were not called for by the consignee, and remained in defendant's possession as warehouseman until November 1, 1911, when, through its negligence, certain of the goods, of the market value of $2,792, were lost.

"This action having been brought to recover the value of the goods lost, and the claim of Federal right already mentioned having been made and overruled, a verdict and judgment went against defendant for the market value of the goods, and this was affirmed by the Court of Appeals, Eighth District, State of Ohio. The Supreme Court of the State declined to review the judgment. The case comes here under Section 237, Jud. Code."

This Court, after stating the provisions of the Commerce Act as amended by the Hepburn Act, concludes as follows:

"From this and other provisions of the Hepburn Act, it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the single term 'transportation,' and subjected to the provisions of the Act respecting reasonable rates and the like. The recommendation of the Interstate Commerce Commission for the adoption of the uniform bill of lading was, of course, made in view of this legislation, and while not intended to be, and not in law binding upon the

carriers, it is entitled to some weight. It recognizes—whether correctly or not, is a question not now presented—the right of the carrier to make a charge, the amount of which has not been definitely fixed in advance, for storage as warehouseman, in addition to the charge for transportation; but at the same time it recognizes that a valuation lower than the actual value may be agreed upon between the shipper and the carrier, or determined by the classification or tariffs upon which the rate is based; and it is a necessary corollary that what should be a reasonable charge for storage would be determined in the light of all the circumstances, including the valuation placed upon the goods.

"We conclude, under the provisions of the Hepburn Act and the terms of the bill of lading, the valuation placed upon the property here in question must be held to apply to defendant's responsibility as warehouseman."

It appears in this case that the plaintiff in error held the property as a warehouseman under the provisions of its bill of lading, which contained practically the same clauses as that referred to in the Dettlebach case; and, such being the case, it was, of course, governed by the Interstate Commerce Act, and the rule of decision in the Federal Court as to where the burden of proof lay in determining whether the carrier was liable for the loss of the goods. The Presiding Judge charged the jury, which charge was affirmed by the Supreme Court of South Carolina, that the burden of proof that there was no negligence on its part rested on the carrier (Record, pages 70-76.)

This was error, because the Act to regulate commerce, having been passed in the light of the law as administered in the Federal Courts, the law which was then of force was the rule which would govern the trial of the cases which came under it, and by such rule as is contained by common carrier to the burden of proving negligence, in cases where railroad companies are charged with the liability of warehouseman, rests upon the plaintiff who makes the charge and never shifts.

Memphis Railroad vs. Reese, 10 Wall., 176.
Carr vs. Railway Company, 194 U. S., 427.
Clark vs. Railroad, 12 How., 272, *et seq.*
Transportation Co. vs. Downer, 11 Wall., 129.

The rule of decision in the Federal Courts, which it is submitted was a right and privilege the plaintiff in error could claim under the Act, required the Court to charge the law as laid down in those decisions instead of charging it with regard to the burden of proof as he did or in attempting to follow the rule of the Supreme Court of the State of South Carolina. The most recent decision on this subject was the *Central Vermont Railroad Company vs. White*, reported at 238 U. S., page 507. This was a case under the Federal Employer's Liability Act, brought in the State of Vermont, where the burden of proof respecting contributory negligence rested upon the plaintiff and not upon the defendant; whereas the rule under the decisions of the United States Supreme Court placed this burden on the defendant. The Court, in disposing of this question, finds as follows:

> "But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of State procedure. For, in Vermont, and in a few other States, proof of plaintiff's freedom from fault is a part of the very substance of this case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further, and, as a condition of his right to recover, must also show (2) that he was not guilty of contributory negligence. In those States the plaintiff is as much under the necessity of proving one of those facts as the other, and as to neither can it be said that the burden is imposed by a rule of procedure, since it arises out of the general obligation imposed upon every plaintiff to establish all of the facts necessary to make out his cause of action. But the United States courts have uniformly held that, as a matter of general law, the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle even in trials in States which hold that the burden is on the plaintiff.
>
> "*Washington & G. R. Co. vs. Gladmon*, 15 Wall., 401 (1), 407, 408, 21 L. ed., 114-116; *Hough vs. Texas & P. R. Co.*, 100 U. S., 225; 25 L. ed., 617; *Inland and Seaboard Coasting Co. vs. Tolson*, 139 U. S., 551 (4), 557, 35 L. ed., 270, 272, 11 Sup. Ct. Rep., 653; *Washington & G. R. Co. vs. Harmon* (*Washington & G. R. Co. vs. Tobri-*

ner), 147 U. S., 581, 37 L. ed., 288, 13 Sup. Ct. Rep., 557; *Hemmingway vs. Ill. Cr. Co.*, 52 C. C. A., 477, 114 Fed., 843. Congress in passing the Federal Employers' Liability Act, evidently intended that the Federal Statute should be construed in the light of these and other decisions of the Federal Court. Such construction of the statute was, in effect, approved in *Seaboard Air Line R. Co., vs. Moore*, 228 U. S., 434, 57 L. ed., 907, 33 Sup. Ct. Rep., 580. There was, therefore, no error in failing to enforce what the defendant calls the Vermont Rule of Procedure as to the burden of proof."

Story on Bailments, Section 410, lays down the following rule as to the burden of proof of negligence:

> "The question may here arise, as in many other cases of bailment, upon whom lies the burden of proof of negligence or of repelling it? With certain exceptions, which will hereafter be taken notice of, as to innkeepers and common carriers, it would seem that the burden of proof of negligence is on the bailor, and the proof merely of loss is not sufficient to put the bailee on his defense."

The general rule on this subject was given by Mr. Justice Pitney in the case of *Sweeney vs. Ewing*, 228 U. S., 233, where he sums it up as follows:

> "The general rule in actions of negligence is that the mere proof of an 'accident' (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur*, the thing speaks for itself; that is to say, if there is nothing to explain or rebut, the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence.
>
> "The doctrine has been so often invoked to sustain the refusal by trial courts to nonsuit the plaintiff or direct a verdict in favor of the defendant, that the application of

the rule, where it does apply, in raising a question for the jury and thus making it incumbent upon the defendant to adduce proof if he desires to do so, has sometimes been erroneously confused with the question of burden of proof. But in the requested instruction now under consideration, the matter was presented in no equivocal form. Plaintiff's insistence was not merely that the evidence of the occurrence of the injury under the circumstances was evidential of negligence on defendant's part, so as to make it incumbent upon him to present his proofs; the contention was that it made it necessary for him to prove, by a preponderance of the evidence, that there was an absence of negligence on his part. . . ."

"In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff.

"Such, we think, is the view generally taken of the matter in well considered judicial opinions."

To the same effect see:

Southern Rwy. Co., Carolina Division, vs. Bennett, 233 U. S., 80.

This is also the doctrine of Mr. Freeman's note in *Schmidt vs. Bland*, 24 Am. Dec., 153, reviewing the authorities as to the burden of proof in bailment cases.

It will thus be seen that whether the shipment was held by the carrier as a carrier or warehouseman, the rule of law for determining the liability, and where the preponderance of testimony should be, is that prescribed by the Federal Courts, and when the State Courts attempted to try the case under State laws as to where the burden of proof rested, there was a contravention of the right of the plaintiff in error, under the Federal Statutes and decis-

ions, for which he is entitled to a hearing and reversal in this Court.

BENJAMIN L. ABNEY,
FRANK G. TOMPKINS,
Attorneys for Plaintiff in Error.

APPENDIX.

THE ACT TO REGULATE INTERSTATE COMMERCE.

Sec. 1. (As amended June 29, 1906, April 13, 1908, and June 18th, 1910.) "That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending mesages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place

in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however*, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country or to any State or Territory as aforesaid."

By the Hepburn Act it was declared that the term transportation—

"shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

Office Supreme Court, U. S.
FILED
DEC 6 1913
JAMES D. MAHER
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 826.

SOUTHERN RAILWAY COMPANY, *Plaintiff in Error,*

vs.

W. E. PRESCOTT, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

Brief for Plaintiff in Error Opposing Motion to Dismiss or Affirm.

BENJAMIN L. ABNEY AND FRANK G. TOMPKINS,

ATTORNEYS FOR PLAINTIFF IN ERROR.

Statement of Plaintiff in Error.

The writ of error asks a review of a judgment of the Suppreme Court of South Carolina, filed September 28, 1914, affirming a judgment of the Court of Common Pleas for Edgefield County, South Carolina, in which judgment had been entered on the verdict in favor of the defendant in error.

The record for this court has not yet been printed, although transcript has been filed. For that reason, reference herein to the evidence and findings of the Circuit and

Supreme Courts of South Carolina will be made to the Case filed in the Supreme Court of the State of South Carolina for the April Term, 1914, which we understand is on file in this case, for the purpose of this motion.

It appears that a shipment of thirteen boxes of shoes was made over the Southern Railway from Petersburg, Virginia, to Edgefield, South Carolina, arriving at Edgefield on the 23d day of June, 1913. The following day an agent of the defendant in error called at the depot of the plaintiff in error for the freight, and, on account of the crowded condition of his wagon, carried away only four of the thirteen boxes, though he paid the freight at that time for the entire shipment, leaving the other nine boxes in the possession of the plaintiff in error to be called for later. The defendant in error did not call for the said boxes previous to the 4th day of July, 1913, and on said day the freight house, or store room, of the plaintiff in error, with all of its contents, including the said boxes, was burned down.

The defendant in error demanded payment for the loss, which was refused. He then brought his suit, on three causes of action, which are set out in the Case for Appeal at pages 2 to 10, inclusive.

The answer of the plaintiff in error set up, after a general denial of the material allegations of the complaint, that the plaintiff in error was a railroad engaged in interstate commerce within the provisions of the Act of Congress to regulate interstate commerce and amendments and supplements thereto controlling and governing interstate railroads, and that the shipment in question was an interstate shipment and should be governed by the Act of Congress of 1887, and various amendments and supplements thereto. (See page 11, Case for Appeal.)

At the close of the case for the defendant in error, plaintiff in error moved for a nonsuit or direction of verdict and the following colloquy and ruling occurred:

> "Mr. Evans: We ask your Honor for a nonsuit or the direction of a verdict under the first count in the complaint as to common carrier. The evidence here

shows that the freight arrived here on the 23d of June, and that the freight was paid and receipted for by the agent of Dr. Prescott. He came for it and paid the freight; and I submit that where a common carrier delivers freight in good order, and has it in its depot and paid for, then its liability as a common carrier ceases.

"And, further, there is no evidence going to show negligence, from which the jury could infer negligence as set out in the complaint.

"The Court: You are on the first count?

"Mr. Evans: Yes, sir; that they are liable as insurers.

"The Court: And they can only be relieved from that by an act of God or a public enemy.

"Mr. Evans: I see the grounds of negligence in the warehouse transaction are set out in the first cause of action and as a common carrier; they are both the same, exactly.

"Mr. Thurmond: There is no negligence in the first cause of action at all.

"Mr. Evans: We ask your Honor for a nonsuit on the whole business. There is no testimony to show that they are liable as a common carrier.

"The Court: We will wait until the testimony is all in; you know when you are on actions of this kind, the Supreme Court looks for a *scintilla*, and that is a very small thing; when the testimony is all in I will give my decision as to directing a verdict. Go ahead."

At the close of the case the attorney for the defendant in error withdrew his cause of action against the plaintiff in error, as a common carrier, and his cause of action for the penalty and asked for judgment on an alleged cause of action against the plaintiff in error as warehouseman, at which time the following argument and ruling occurred:

"Mr. Thurmond: The plaintiff withdraws his cause of action against the defendant as a common carrier and withdraws his cause of action against the defen-

dant for the penalty, and the case proceeded to trial only on the cause of action against the defendant as a warehouseman.

"Mr. Evans: We will ask for a verdict on the other, as he has withdrawn the actions for the penalty and as common carrier.

"The Court: It is on the question of a warehouseman.

"Mr. Evans: We take the position that under the Interstate Commerce Commission Rules, as adopted and published by the railroads, that the bill of lading which my friend has introduced in evidence, we are entitled to have the action as to the warehouseman dismissed; we think we are entitled to have your Honor instruct the jury that the contract between Dr. Prescott and the railroad company, as contained in this bill of lading, is the law. The bill of lading was the contract under which the railroad accepted this freight. We take the position that the bill of lading is the law and the contract in this case, and that we are entitled to a verdict.

"The Court (after hearing arguments): Go to the jury, gentlemen."

Upon the close of the arguments to the jury, the Court delivered the following charge: (See pages 91-92, Case for Appeal.)

After verdict for the defendant in error, the attorney for the plaintiff in error moved for a new trial on the ground that the Court had held that there was no Federal question raised in the case, and had charged that the burden was on the plaintiff in error to prove that there was no negligence on his part in the loss of the goods; whereas the burden of proof, under the Federal Act, was on the defendant in error to prove negligence on the part of the carrier before he could recover, and there had been no such negligence shown.

The trial Judge admitted that he had charged the jury that the Federal decisions were not binding, that he was

trying the case under the South Carolina decisions. (Pages 96-97, Case for Appeal.)

This case was appealed to the Supreme Court of South Carolina and an opinion was rendered affirming the judgment of the Court below.

In the said opinion the Court, after finding the facts substantially as stated here, held that the attorney for the plaintiff in error had conceded that the contract of carriage had ended, and that the plaintiff in error held the goods by a separate contract, which prevented the liabiilty of plaintiff in error as a common carrier or warehouseman under the Federal Statute from being considered by that Court, in the following words:

> "The defendant claims that inasmuch as this is an interstate shipment, the Federal Statute governs. This question does not legitimately arise in this case for the reason that the appellant moved for a nonsuit on the ground that 'the evidence here shows that this freight arrived here on the 23d of June, and that the freight was paid and receipted for by the agent of Dr. Prescott. He came for it and paid the freight, and I submit that where a common carrier delivers freight in good order, and has it in its depot and paid for, then its liability as common carrier ceases.' The Court reserved its decision on that question; and before it was announced, the plaintiff withdrew the cause of action against the defendant as common carrier, and also the cause of action for the penalty. It, therefore, being conceded in the Circuit Court that the contract of carriage was ended, and the appellant held the goods by a separate contract, the question as to appellant's liability as common carrier and the Federal Statute, under which it might have arisen, is not before this Court, and the only question argued which we can consider is the question as to warehouseman."

The Presiding Judge charged the jury as follows:

> "It is for you to say whether the railroad company was negligent, and they must show to your satisfac-

tion that they were not negligent; what precautions were taken and all that sort of thing." Case for Appeal, page 94. Which charge was made the basis of the plaintiff in error, first exception. See page 97, Case for Appeal, which charge seems to have been affirmed by the Supreme Court of South Carolina. See 99 S. C., at page 411.

After the decision of the Supreme Court of South Carolina, the case was regularly brought to this Court by writ of error, where it is now pending, though, as stated above, the record has not yet been printed. Notice of motion to dismiss this appeal has been made, and this Brief is filed to dismiss, affirm or place on the summary docket, and this argument is filed in answer thereto, although under difficulty in not having a printed transcript to refer the Court to.

ARGUMENT.

The assignments in error filed herein are three in number, but they all support the one point, that the courts, both Circuit and Supreme, erred in finding that the case should not have been tried and governed by the statutes of the United States and the decisions of this Court thereon. It is conceded that the shipment was an interstate shipment, and that the goods for which the defendant in error was suing, had not been delivered to the consignee. So that practically the entire question before this court will be as to whether the rules laid down by the Statute of Congress and the decisions of this court ceased to govern the liability of the carrier to the consignee, as it must be admitted that under the said statute and the decisions of the Supreme Court of the United States construing the same, the burden of proof of negligence and failure to deliver rests throughout, in the trial had for a recovery, upon the consignee and not the carrier as warehouseman, and all acts and decisions of any State court regarding any different or other liability have been superseded by the Federal Statutes and

decisions. See *Charleston & Western Carolina Railway Company vs. Varnville Furniture Company*, decided June 1, 1915, by the United States Supreme Court, and reported in 237 U. S., at page 597. Confirming *Boston & M. R. Co. vs. Hooper*, 233 U. S., 97, where it is said: "The special regulations and policies of particular States upon the subject of the carrier's liability for loss or damage to interstate shipments and the contracts of carriers with respect thereto have been superseded," and "When Congress has taken the particular subject matter in hand, coincidents are as ineffective as opposition, and a State law is not to be declared a help because it attempts to go further than Congress has seen fit to go."

It cannot be claimed that there had in this case been any actual delivery in the sense that interstate commerce had ceased.

Section 1, of the Interstate Commerce Act, as amended by Act of June, 1906, includes acts done after the arrival of the goods and after the liability becomes one of warehouseman, for it specifically provides for storage charges, and the bill of lading in this case refers to it. There being no actual delivery, the Federal law still applies, and it retains the character of an interstate shipment, and even though the shipment had been placed in the carrier's warehouse for delivery to the consignee, there must have been an actual delivery, and parting with the custody of the property before such an arrival had taken place, as would take from the shipment its interstate character. See *Paul Hyman vs. Southern Railway*, 203 U. S., page 271, and this would not be affected, even though the agent consented to keep the shipment for consignees after its arrival. See *Adams Express Co. vs. Ky.*, 206 U. S., at page 136.

By reference to the Interstate Commerce Act, Section 1, and the proviso thereto, it appears that the same refers, not only to transportation, but to the receiving, delivering, storage or handling of property, and even though it might be held that the carrier in this case, by reason of the facts set out above, held the property of the consigne as a ware-

houseman, it was nevertheless true that his holding of the property as such was still governed by the interstate commerce act.

The presiding Judge charged the jury, which charge was affirmed by the Supreme Court of South Carolina, that the burden of proof that there was no negligence on its part rested on the carrier.

This was error because the Act to regulate commerce having been placed in the light of the law as administered in the Federal Courts, the law which was then of force was the rule which would govern the trial of cases which came under it, and by such rule, as is contended by common carriers today, the burden of proving negligence in cases where railroad companies are charged with the liability of warehouseman rests upon the plaintiff who makes the charge and never shifts.

> *Memphis Railroad vs. Reese,* 10 Wall., 176.
> *Carr vs. Railway Company,* 194 U. S., 427.
> *Clark vs. Railroad,* 12 How., 272 *et seq.*
> *Transportation Co. vs. Downer,* 11 Wall., 129.

The rule of decision in the Federal Courts which it is submitted was a right and privilege the plaintiff in error could claim under the Act, required the Court to charge the law as laid down in those decisions instead of charging the law with regard to the burden of proof as he did or in attempting to follow the rule of the Supreme Court of the State of South Carolina.

"The question may here arise, as in many other cases of bailment, upon whom lies the burden of proof of negligence or of repelling it? With certain exceptions, which will hereafter be taken notice of, as to innkeepers and common carriers, it would seem that the burden of proof of negligence is on the bailor, and the proof merely of loss is not sufficient to put the bailee on his defense." Story on Bailments, Sec. 410. See also the rule laid down in *Sweeney vs. Ewing,* 228 U. S., 233, and Mr. Freeman's note

in *Schmidt vs. Bland,* 24 Am. Dec., 153, reviewing the authorities as to the burden of proof in bailment cases.

It will thus be seen that whether the shipment was held by the carrier, as a carrier or warehouseman, the rule of law for determining the liability and where the preponderance of testimony should be, is that prescribed by the Federal Courts, and when the State Courts attempted to try the case under State laws as to where the burden of proof rested, there was a contravention of the right of the plaintiff in error, under the Federal Statutes and decisions, for which he is entitled to a hearing and reversal in this court.

BENJAMIN L. ABNEY,
FRANK G. TOMPKINS,
Attorneys for Plaintiff in Error.

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—IN THE—

SUPREME COURT OF THE UNITED STATES

October Term, 1915.

No. 826. 358

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

vs.

W. E. PRESCOTT, Defendant in Error.

ON WRIT OF ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

NOTICE TO DISMISS OR AFFIRM AND BRIEF.

W. H. TOWNSEND,
Attorney for Defendant in Error.

J. WM. THURMOND,
Of Counsel.

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CITATIONS.

Prescott vs. So. Ry., 99 S. C., 410.

Brunson and Boatwright vs. R. R., 76 S. C., 9.

Fleischman vs. R. R., 76 S. C., 247.

Boston & Maine R. R., Plff. in error vs. Catherine Hooker, 58 L. ed., 527.

Egan vs. Hart, 165 U. S., 188.

Clipper Min. Co. vs. Eli Min. & L. Co., 48 L. ed. 948.

Sou. Ry. Co. (Carolina Division) et al vs. Hattie E. Bennett, admx., 58 L. ed., 566.

Easterling Lumber Co., Plff. in error vs. S. W. Pierce, Defdt. in error, 59 L. ed., 133.

IN THE SUPREME COURT OF UNITED STATES.

October Term, 1915.

No. 826

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

vs.

W. E. PRESCOTT, Defendant in Error.

On Writ of Error to the Supreme Court of South Carolina.

MOTION TO DISMISS OR AFFIRM AND BRIEF.

Now comes the defendant in error, W. E. Prescott, by his counsel, W. H. Townsend, appearing in his behalf, and moves the Court to dismiss the Writ of Error in the above entitled cause, for want of jurisdiction and upon the grounds set forth in the brief filed herewith.

The defendant in error further moves the Court to affirm the judgment rendered by the Supreme Court of the State of South Carolina upon the ground that it is manifest that the Writ of Error was taken for delay only, and that the questions from which the decision

of the cause depends are so frivolous, as not to need not to justify extended argument.

The defendant in error further moves the Court in the event that it should desire to hear argument on the questions involved, that this cause be transferred to the summary docket, and there be proceeded with on the ground that the cause is of such a character as not to justify extened argument.

The grounds of this motion, the statement of the case, and the arguments thereon are more fully set forth in the accompanying brief, all of which is respectfully herewith submitted.

W. H. TOWNSEND,
Attorney for Defendant in Error

To N. G. Evans and B. L. Abney, Attorneys for Southern Railway Company, Plaintiff in Error:

GENTLEMEN: Please take notice that on Monday, the 6th day of December, A. D. 1915, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy, will be submitted to the Supreme Court of the United States, for its decision.

Attached hereto, please find copy of the motion to dismiss or affirm, the brief and argument to be submitted in support thereof, and also the motion to transfer this cause to the summary docket, if the Court should desire to hear argument thereon.

W. H. TOWNSEND,
Attorney for Defendant in Error.

The foregoing notice is hereby accepted and delivery of a copy thereof, together with the above mentioned motion and brief therein mentioned, are hereby acknowledged this [redacted]day of November, A. D., 1915.

B L Abney.
Attorney for Plaintiff in Error

IN THE SUPREME COURT OF UNITED STATES.
October Term, 1915.

No. 826.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

vs.

W. E. PRESCOTT, Defendant in Error.

On Writ of Error to the Supreme Court of South Carolina.

STATEMENT OF DEFENDANT IN ERROR.

The action in this case was commenced in the Court of Common Pleas for Edgefield County, on the _____day of_____, 1913, by W. E. Prescott against Southern Railway Company, to recover damages for nine (9) cases of boots and shoes with freight on the same, aggregating two hundred and forty-one and 78-100 dollars, said boots and shoes having been destroyed by fire in the warehouse of Southern Railway Company, the plaintiff in error, early in the morning, on July 4th, 1913.

The complaint contains three causes of action:

FIRST. A cause of action against Southern Railway Company as a Common Carrier.

SECOND. A cause of action against Southern Railway Company as a Warehouseman.

THIRD. A cause of action against Southern Railway Company for a penalty for failure to adjust and pay the claim within the time provided by law.

The first and third causes of action against Southern Railway Company to-wit, those against it as a Common Carrier and for a penalty, were discontinued before the case was submitted to the jury, and the case went to the jury on the second cause of action, that is, the cause of action against Southern Railway Company as a Warehouseman. The jury found for

the defendant in error, W. E. Prescott, the full amount sued for, two hundred and forty-one and 78-100 dollars. 17

The exceptions of the plaintiff in error in the Court of Common Pleas were numerous as will be seen by an examination of them beginning at page ninety-seven (97) of the case, however, they imputed error principally, on the following grounds:

"That as the complaint stated certain specifications of negligence the Presiding Judge erred in charging that the burden of showing that there was no negligence was on the defendant; also that the Presiding Judge erred, in refusing to hold and decide that the plaintiff in error was a gratuitous bailee; also, that the case was controlled by the Acts of Congress known as the Act to regulate interstate commerce, and the Acts amendatory and supplemental thereof, generally known as the Carmac Amendment, and that the burden was not on the defendant to show that it was not guilty of negligence that caused the loss of the property in said warehouse, but the plaintiff was required to establish negligence, and the burden was on him, and that the trial judge erred in not so instructing the jury." 18

The case was tried against Southern Railway Company as a warehouseman. The freight consisted of a shipment of shoes from Petersburg, Va., to Edgefield, S. C. The shoes arrived at Edgefield, on the 23rd day of June, 1913, and on the following day the plaintiff's agent called at the station for freight, and on account of the crowded condition of his wagon took only four (4) boxes of the shoes. Plaintiff's agent paid the freight in full on the whole shipment, but left nine (9) boxes of the shoes in possession of the defendant to be called for later. On the morning of the 4th day of July following, the warehouse of the plaintiff at Edgefield, S. C., including the nine cases of shoes were burned and destroyed. 19 20

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FINDINGS OF FACT BY THE SUPREME COURT OF SOUTH CAROLINA.

21 The Supreme Court of South Carolina in this case, Prescott vs. Southern Railway Company, reported in 99 S. C., at pages 410 and 411 found the following facts: "This is an action against the defendant for loss by fire of certain boxes of shoes while in the defendant's possession. Thirteen boxes of shoes were shipped from Petersburg, Va., to the plaintiff at Edgefield, S. C. They arrived in Edgefield on the 23rd day of June, 1913. On the following day the plaintiff's agent called at the depot for freight and on account of the crowded condiition of his wagon, took
22 only four boxes. Plaintiff's agent paid the freight on all, but left nine boxes in the possession of the defendant to be called for later. On the morning of the 4th day of July following, the warehouse of the defendant with its contents, including the shoes, burned down. The plaintiff demanded payment for the loss, which was refused. The plaintiff then brought this suit alleging three causes of action. The first cause of action was against the defendant as Common Carrier; the second as Warehouseman, and the third was for the penalty for nonpayment.

Judgment was for the plaintiff, and the defendant appealed.

23 There are several exceptions, but the appellant argues but two questions. The defendant claims that in as much as this is an interstate shipment, the Federal Statute governs. This question does not legitimately arise in this case for the reason that the appellant moved for a non-suit on the ground that "the evidence here shows that this freight arrived here on the 23rd of June and that the freight was paid and receipted for by the agent of Dr. Prescott. He came for it and paid the freight, and I submit that where a common carrier delivers freight in good order and has it in its depot and paid for then its liability as common carrier ceases." The Court reserved its decision on
24 that question; and before it was announced, the plain-

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tiff withdrew the cause of action against defendant as Common Carrier, and also the cause of action for the penalty. It, therefore, being conceded in the Circuit 25
Court that the contract of carriage was ended, and the appellant held the goods by a separate contract, the question as to appellant's liability as common carrier and the Federal Statute, under which it might have arisen, is not before this Court, and the only question argued which we can consider is the question as to warehouseman."

ARGUMENT.

We submit these findings of fact by the Supreme Court of South Carolina will not be reviewed by this 26
court.

Egan vs. Hart, 165 U. S. 188, 41, L. ed. 680;

Clipper Min. Co. vs. Eli Min. & L. Co. 194 U. S., 48 L. ed., 948.

Under the authorities it must be clear that no Federal question was involved in this case before the Supreme Court of South Carolina; however, whatever view on that point this court takes this motion to dismiss should be granted, as the case was submitted to the jury against the railroad company as a common carrier and the complaint contained allegations of negligence, and the testimony tended to establish those allegations. The contention of the railroad company 27
that the burden of proof was not on it to show that it was not negligent is without merit for two reasons:

First, because the plaintiff showed negligence at the opening of his case; Second, after the plaintiff showed that the railroad company had received the freight and had failed to deliver or account for it, the burden was on the railroad company to show that the freight was not lost by its negligence. See Brunson & Boatwright vs. R. R. 76 S. C., page 9, also Fleischman vs. R. R. 76 S. C., 247.

The defendant is made a warehouseman under the bill of lading issued by it. See section 1, of bill of lading which appears on inserted sheet between pages 28

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88 and 89 of the case, one clause of which reads as follows:

29 "For loss, damage or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given the carrier's liability shall be that of warehouseman only."

The card directed to the plaintiff appearing on page 91 provides: "Demurrage and storage will be assessed at the expiration of the free time provided by the rules of this company. This company will be liable only as warehouseman while the L. C. L. freight is in their possession, holding same only at owner's risk of loss by fire."

30 The bill of lading, the contract between the parties does not attempt to relieve the defendant of negligence, but makes it liable for negligence by contracting that it will be liable as warehouseman.

The postal card above referred to is simply notice to the plaintiff and attempts to relieve the defendant of negligence in the case of fire, but this is contrary to public policy, besides, the plaintiff never agreed thereto. Under the bill of lading the defendant is liable as warehouseman.

The identical question has been decided by this Court.

31 In the recent noted case, Boston & Maine R. R., Plff. in Err., vs. Katharine Hooker, reported in No. 12 Advance Sheet dated May 15th, 1914, 58 L. ed., at page 527, the majority opinion of the Court rendered by Justice Day, says:

"It is to be borne in mind that the action as tried and decided in the State Court was not for negligence of the railroad company as a warehouseman for the loss of the baggage after its delivery at Sunapee Lake Station, but was solely upon the contract of carriage in interstate commerce."

What more could the railroad company ask under the Federal law, the answer perhaps will be, that
32 the burden of proof should have been on the plaintiff

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and not on the defendant; we think not under the authorities. In the case of So. Ry., Carolina Division et al, in error, vs. Hattie E. Bennett, Admx., reported in 33
58 L. ed., page 566 Adv. Sh. No. 12, of May 15th, 1914, the Supreme Court of the United States held that under the Employers' Liability act of April 22nd, 1908, "it was not error for the judge to charge the jury in action for the death of a railway fireman caused by the falling of his engine through a burning trestle when it is shown that the wood of the trestle was rotten and coals of fire dropped from the ash pan of another engine and set it on fire, the master assumes the burden of proving that he exercised due care in the premises; though the burden of proving negligence is on the plaintiff throughout the case." This 34
last principle, as I understand it, is simply the same as our preponderance rule placed on the plaintiff in any affirmative matter.

For frivolousness of Federal question see Easterling Lumber Co., et al., Plaintiffs in Error vs. S. W. Pierce, Defendant in Error, 59 (U. S.) L. ed., Adv. Sh. No. 4, page 133.

In conclusion, it is submitted that the issues of fact made by the pleadings and evidence in this case were fairly submitted to the jury and the instructions of the Court covered the law fully and correctly applicable to the case, and the judgment should be affirmed since no prejudicial error is assigned or shown. 35

Respectfully submitted,
W. H. TOWNSEND,
Attorney for Defendant in Error.
J. Wm. THURMOND,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 353

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

vs.

W. E. PRESCOTT, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

BRIEF FOR DEFENDANT IN ERROR.

W. H. TOWNSEND, ATTORNEY FOR DEFENDANT IN ERROR.
J. WM. THURMOND, OF COUNSEL.

CHRONICLE PRINT, EDGEFIELD, S. C.

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IN THE

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SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

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IN ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

BRIEF FOR DEFENDANT IN ERROR.

W. H. TOWNSEND, ATTORNEY FOR DEFENDANT IN ERROR.

J. WM. THURMOND, OF COUNSEL.

HISTORY OF CASE.

At the times mentioned in the pleadings the Seaboard Air Line Railway and Southern Railway Company, were common carriers by railroad engaged in interstate commerce; and the defendant in error, W. E. Prescott, was a resident of the State of South Carolina about ten miles from Edgefield ~~aforesaid~~.

June 21st, 1913, thirteen cases of boots and shoes were delivered by Augustus Wright Company, at Petersburg ~~aforesaid~~, to Seaboard Air Line Railway for transportation from said place to Edgefield aforesaid: and said freight was delivered to Southern Railway Company and transported by it to destination, and ar-

rived at Edgefield on June 23rd, 1913. The next day Eustice Prescott, a son and agent of the consignee, called at the station of Southern Railway at Edgefield aforesaid, and receipted for said freight in full, and paid all charges for transportation, and carried home four (4) cases of boots and shoes, a part of said shipment. On or about the date of arrival of said goods at Edgefield, said Southern Railway Company mailed to the consignee, a postal card containing the following notice, "Demurrage and storage will be assessed at the expiration of the free time provided by the rules of this company. This company will be liable only as warehouseman while the L. C. L. freight is in their possession, holding same only at owner's risk of loss by fire." Section 1, of bill of lading issued by the carrier to the consignee contains this clause; "For loss, damage or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given the carrier's liability shall be that of warehouseman only."

Early in the morning of July 4th, 1913, nine cases of the boots and shoes, consisting of the whole lot, left by the agent of the consignee with the Railway Company as aforesaid, were destroyed by fire. A claim was filed for the same on July 31st, 1913. Subsequently an action was instituted by W. E. Prescott against the Railway Company, for the value of said freight in a complaint containing three causes of action, to-wit:

1st. A cause of action against Railway Company as a Common Carrier.

2nd. A cause of action against Railway Company as a Warehouseman.

3rd. A cause of action against Railway Company for a penalty for failure to adjust and pay the value of said destroyed freight within sixty (60) days after its destruction.

When all the evidence of the plaintiff and defendant had been offered, the plaintiff announced that he withdrew the first and third causes of action of the

complaint, that is, the cause of action against the defendant, as a Common Carrier, and for a Penalty, and demanded a verdict on the cause of action against the defendant as warehouseman. After argument pro and con, and instructions from the court, the jury found for the plaintiff two hundred forty-one and 78-100 dollars. Judgment was duly entered on said verdict, and an appeal from said judgment was then carried to the Supreme Court of South Carolina, which court dismissed the appeal and affirmed the judgment.

FINDINGS OF FACT BY THE SUPREME COURT OF SOUTH CAROLINA.

The Supreme Court of South Carolina in this case, Prescott vs. Southern Railway Company, reported in 99 S. C., at pages 410 and 411 found the following facts: "This is an action against the defendant for loss by fire of certain boxes of shoes while in the defendant's possession. Thirteen boxes of shoes were shipped from Petersburg, Va., to the plaintiff at Edgefield, S. C. They arrived in Edgefield on the 23rd day of June, 1913. On the following day the plaintiff's agent called at the depot for freight and on account of the crowded condition of his wagon, took only four boxes. Plaintiff's agent paid the freight on all, but left nine boxes in the possession of the defendant to be called for later. On the morning of the 4th day of July following, the warehouse of the defendant with its contents, including the shoes, burned down. The plaintiff demanded payment for the loss, which was refused. The plaintiff then brought this suit, alleging three causes of action. The first cause of action was against the defendant as Common Carrier; the second as Warehouseman, and the third was for the penalty for nonpayment.

Judgment was for the plaintiff, and the defendant appealed.

There are several exceptions, but the appellant argues but two questions. The defendant claims that in as much as this is an interstate shipment, the Feder-

al Statutes govern. This question does not legitimately arise in this case for the reason that the appellant moved for a non-suit on the ground that "the evidence here shows that this freight arrived here on the 23rd of June and that the freight was paid and receipted for by the agent of Dr. Prescott. He came for it and paid the freight and I submit that where a common carrier delivers freight in good order and has it in its depot and paid for then its liability as common carrier ceases." The court reserved its decision on that question; and before it was announced, the plaintiff withdrew the cause of action against defendant as Common Carrier, and also the cause of action for the penalty. It, therefore, being conceded in the Circuit Court that the contract of carriage was ended, and the appellant held the goods by a separate contract, the question as to appellant's liability as common carrier and the Federal Statute, under which it might have arisen, is not before this court, and the only question argued which we can consider is the question as to warehouseman."

ARGUMENT.

In the case of Lillian W. Egan and husband, Plffs. in Error vs, Hart, Richardson and Kerr, 165 U. S. 188, 41 L. ed. 680, the Supreme Court held; "We, however, conclude that not only the very nature of the writ of error, but also the rulings of this court from the beginning, make it clear that on error to a state court in a chancery case, as in a case at law, when the facts are found by the court below, this court is concluded by such findings. The adjudications are collected very fully in DOWER vs. RICHARDS, and in the subsequent cases above referred to."

"It is likewise settled that on error to the Supreme Court of Louisiana the opinion of that court is to be treated as part of the record, and that it may be examined in order to ascertain the questions presented, and this court may for the purpose, not of deciding the facts, but by way of throwing light on the findings, look into the entire record. CROSSLEY vs. NEW OR-

LEANS) * 108 U. S. 105 (27: 667) GROSS vs. UNITED STATES MORT. CO. 108 U. S. 477 (27: 795)."

In the case of Clipper Mining Co., Plffs. in Err. vs. Mining and Land Co., 194 U. S. 220, 48 L. ed. 948 it is held:

"It is the settled rule that this court, in an action at law, at least, has no jurisdiction to review the conclusions of the highest court of the State upon questions of fact."

Dower vs. Richards 151 U. S. 658, 38 L.ed. 305;
Isrel vs Arthur 152 U. S. 355, 38 L.ed. 474.

The Supreme Court of South Carolina found as a fact that the freight was destroyed by fire while held by the Ry. Co., under a separate contract from the contract for transportation of the same.

We submit that the findings of fact by the Supreme Court of South Carolina will not be reviewed by this court.

Egan vs Hart, 165 U. S. 188, 41 L.ed. 680;
Clipper Min. Co. vs. Eli. Min. & L. Co., 194 U. S. 48 L.ed., 948.

WHAT PRINCIPLES OF LAW CONTROL THIS CASE?

First. Was a Federal question involved in said case, if not, that ends the contention of the plaintiff in error.

Second. If the Federal law applies to this case, then under the pleadings, evidence and instructions of the court, the plaintiff in error was not prejudiced and the judgment should stand.

NO FEDERAL QUESTION INVOLVED.

The bill of lading issued in this case from which stipulations have been hereinabove quoted slearly establishes that at the time of the fire the Railway Company held said freight as warehouseman under a separate contract from that of transportation. The consignee paid the transportation charges and receipted in full for the whole shipment and actually removed a part of the shipment. See the case of Stewart vs. C.

& G. Ry. Co. (Ga.) Reported in 60 S. E. at page 1, in which it is held "When a Common Carrier has transported a shipment to destination, and the consignee has paid the freight and given his receipt for the shipment, the contract of carriage is completed, also see Kenny Co. vs A. & W. P. R. R. Co., 50 S. E., 132. See also to same effect 25 L. R. A. (N. S.)

It will be observed that the bill of lading, the contract between the parties, does not attempt to relieve the Railway Company of negligence, but impliedly makes it liable for negligence by contracting that it will be liable as warehouseman. The postal card above referred to, was issued by an agent of the Railway Company at Edgefield, and attempts to relieve the defendant of negligence in the case of fire, but such a proposition is contrary to public policy, besides, the consignee never agreed thereto. The Railway Company in the trial of the case in the Court of Common Pleas and in the hearing before the Supreme Court of South Carolina, pressed strenuously the point, that the Railway Company was not liable as a Common Carrier, because the goods had been receipted for, freight charges paid, and part of the goods delivered, and therefore, there was at least a constructive delivery of the whole, and that the Railway Company held the freight as an accommodation bailee. In the trial of this case in the Court of Common Pleas and in the hearing before the Supreme Court of South Carolina, it was admitted and most earnestly urged by the Railway Company that the relation between the Railway Company and the consignee had changed from that of Common Carrier and was that of accommodation bailee when the fire occurred.

The case of Hyman vs. So. Ry. Co. Reported in 203 U. S. page 271, 51 L.ed. page 178, does not sustain the position of the plaintiff in error. The subject matter consists of whiskey shipped from Augusta to Charleston in packages and after reaching Charleston was unloaded into the warehouse of the railroad company ready for delivery. The Supreme Court holds"The

record does not show that the consignees were notified of the arrival of the goods. Shortly after the goods were placed in the warehouse they were seized and taken from the possession of the railway company. The seizures were made without any warrant or other process by constables acting under the dispensary law of South Carolina."

The court will observe that in the Hyman case the goods had not been receipted for and the consignees not even notified of their arrival. The Supreme Court in that case makes the following deliverance:

"Of course, we are not called upon in this case, and do not decide, if goods of the character referred to in the Wilson Act, moving in interstate commerce, arrive at the point of destination, and, after notice and full opportunity to receive them, are designedly left in the hands of the carrier for an unreasonable time, that such conduct on the part of the cosignee might not justify, if affirmatively alleged and proven, the holding that goods so dealt with have come under the operation of the Wilson act, because constructively delivered."

The case of Adams Express Co. Plff. in Err. vs. Commonwealth of Kentucky, Deft. in Error, 206 U. S. page 136, 51 L.ed. page 987 is not analogous with the case now before this court. The shipment in that case consisted of alcoholic liquors and had not been receipted for by the consignee.

In the recent noted case, Boston & Maine R. R. Plff. in Err. vs Katharine Hooker, reported in No. 12 Advance Sheet dated May 15th, 1914, 58 L.ed., at page 527, the majority opinion of the court rendered by Justice Day, says:

"It is to be borne in mind that the action as tried and decided in the State Court was not for negligence of the railroad company as a warehouseman for the loss of the baggage after its delivery at Sunapee Lake Station, but was solely upon the contract of carriage in interstate commerce."

The Railroad Company can find no consolation whatsoever in the decision of the recent case of C. C.

C. & St. Louis Ry. Co. vs. Dettleback, Reported in 239 U. S., page 588.

That case does hold that the term transportation embraces all facilities in connection with the shipment including storage of goods after arrival at destination and notice given to consignee. The facts of that case establish though that two relations between the carrier and the consignee arose under one and the same contract. In the case now before the court, the two relations, to-wit: common carrier and warehouseman arose under different contracts. The relation of warehouseman arose under the last contract which is controlled by the common law of force in the State of South Carolina. It is not disputed that the relation of common carrier and warehouseman both may arise under the contract of transportation in interstate commerce; but when the goods have arrived and been receipted for and the transportation charges paid and a part of the goods actually delivered and the others constructively delivered and there is a new contract for the railroad company to hold the balance of the goods in storage, why then the Hepburn Law does not, and cannot be made to apply, for Congress would have no power to enact a law that could apply in such a case. It is true that Congress is supreme in its power of legislation when it has jurisdiction, but its powers are not only confined to those which may be inferred from the Constitution but are also restrained by the express limit upon their exercise which are contained in that instrument. They are delegated and enumerated and then limited.

Howard vs. Illinois S. R. Co. 52 L.ed. page 324.

It is well settled that Congress has no power to regulate purely internal commerce of the States.

Howard Case Supra.

The Employer's Liability Act of 1906 was struck down because Congress went beyond the limit of its power as fixed by the Constitution.

IF A FEDERAL QUESTION IS INVOLVED, THE JUDGMENT SHOULD BE AFFIRMED.

The cause of action on which the verdict was ren-

dered contained allegations of negligence. The evidence tended to show negligence. The court instructed the jury that a recovery should be had only for negligence. Hence the plaintiff in error was not deprived of any right because the Presiding Judge took the view that the Federal law did not apply to the case. Under the Federal law the same allegations in the complaint would be applicable so would the evidence. The only objection that can be urged by the plaintiff in error, is as to the rule of evidence, and there was really a substantial compliance with the requirement of the Federal law under the principle charged by the court. The court instructed the jury that when a common carrier received freight and it was destroyed by fire while stored in its warehouse then the burden is upon the Railway Company to show that it was not guilty of negligence in the management of the same. The answer of the plaintiff in error contains allegations to the effect that it was not negligent in holding the goods, etc. We submit that there was no error in this instruction even if the Federal law applies to the case. The case directly in point is So. Ry. Carolina Division, et al vs. Hattie E. Bennett, Amx. Reported in 58 L.ed., page 566. In that case this Court held, "It was not error for the Judge to charge the jury in action for the death of a railway fireman caused by the falling of his engine through a burning trestle when it is shown that the wood of the trestle was rotten and coals of fire dropped from the ash pan of another engine and set it on fire, the master assumes the burden of proving that he exercised due care in the premises; though the burden of proving negligence is on the plaintiff throughout the case." The said instructions of the court were in accord with the decisions of the State of South Carolina and this court. See the following cases:

Fleischman vs. Railway Co., 76 S. C., 246, holds "The facts surrounding the loss, particularly the precautions taken against it, are usually known to the bailee or ascertainable by him. On the other hand, the owner of the property cannot be supposed to know

the details of a warehouseman's business for he is often hundreds of miles away", etc. The case of Brunson & Boatwright vs. Ry. Co., 76 S. C., at page 9 holds: "The fact that it has a right as a warehouseman to collect storage charges makes it a bailee for hire and prevents it from claiming that it was merely a gratuitous bailee, at least before giving notice that it will not insist upon charges, and will not longer hold possession of the property as a warehouseman."

SUTTON vs. RY. CO. 82 S. C., 345, holds; "That where there is a presumption of negligence the specific acts of negligence alleged in the complaint need not be proved."

It seems to be well established that where a case is brought under the Federal law but there is no Federal question involved, or brought under the State law when there is a Federal question involved, the court having cognizance of the case in either event, the judgment will not be reversed if the trial and instructions are not prejudicial to the plaintiff in error. The plaintiff in error in this case having made a motion for nonsuit and urged in the State courts that the railway company did not hold the freight as a common carrier but that the relation between the parties had changed, and said company held it as a gratuitous warehouseman, should not be permitted to shift its position and say that a Federal question was involved.

WARBASH R. CO. vs. Hanes 58 L.ed., P. 1230.

We submit that no view of this case entitles the plaintiff in error to reverse the judgment of the State courts.

W. H. TOWNSEND,
Attorney for Defendant in Error.

J. WM. THURMOND,
of Counsel.

SOUTHERN RAILWAY COMPANY *v.* PRESCOTT.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 358. Argued February 23, 1916.—Decided April 10, 1916.

Whether the contract based on a bill of lading of an interstate shipment issued pursuant to the Act to Regulate Commerce has been discharged is a Federal question.

Transportation, as regulated by the Act to Regulate Commerce, includes the services of a connecting carrier as warehouseman of the goods after arrival at point of destination and before actual delivery to the consignee.

Retention by the carrier of part of an interstate shipment, after arrival at destination, notice to, and payment of the freight by, the consignee, *held* in this case to be a terminal service forming part of the transportation in the sense of, and governed by, the Act to Regulate Commerce.

With respect to service governed by the Act to Regulate Commerce, the rule that both carrier and shipper are bound by, and cannot alter, the terms of service as fixed by the filed regulations, applies

not only to rates but also to other stipulations relating to services and facilities within the purview of the act, including liability as warehouseman after arrival of the goods at destination and before removal by the consignee.

The contract of a bill of lading of an interstate shipment is still in force until actual delivery to the consignee; and *held* that the mere giving of a receipt by the consignee and payment of freight but leaving the goods with the carrier did not, in this case, amount to actual delivery and affect the liability of the carrier under the stipulations as to liability contained in the bill of lading.

The measure of liability of a carrier of an interstate shipment under the bill of lading issued pursuant to the Act to Regulate Commerce is a Federal question and the obligation is to be governed under the Act by uniform rule in the place of the diverse requirements of state legislation and decisions; nor is the question less a Federal one because resolved by application of general principles of common law.

Under a stipulation in a bill of lading of an interstate shipment that the carrier shall be liable, as warehouseman only, for goods after arrival at destination and not removed within the specified time, the carrier is liable only for negligence; and if the loss admittedly occurs by fire the burden is on the plaintiff to prove negligence, notwithstanding the rule may be different under state law.

99 So. Car. 422, reversed.

THE facts, which involve the liability of an interstate carrier as warehouseman of goods after arrival at destination, are stated in the opinion.

Mr. Frank G. Tompkins, with whom *Mr. Benjamin L. Abney* was on the brief, for plaintiff in error.

Mr. J. Willard Ragsdale, with whom *Mr. W. H. Townsend* and *Mr. J. William Thurmond* were on the brief, for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This action was brought to recover for the loss of nine boxes of shoes which were destroyed by fire, on July 4,

1913, while in the possession of the Southern Railway Company, plaintiff in error. These boxes were part of a lot of thirteen boxes which had been shipped on June 21, 1913, at Petersburg, Virginia, by the Seaboard Air Line Railway and connections, consigned to W. E. Prescott, defendant in error, at Edgefield, South Carolina, and had arrived at Edgefield over the line of the Southern Railway Company on June 23, 1913. The plaintiff alleged three causes of action against the latter Company (1) as common carrier (2) as warehouseman and (3) for penalty because of failure to adjust and pay the claim, after notice, as provided by law. The answer of the Railway Company, with a general denial, set up that the shipment was interstate and governed by the Act to Regulate Commerce. At the close of the plaintiff's case, the Railway Company moved for a non-suit and decision was reserved. The Railway Company then put in evidence the tariff rules, filed with the Interstate Commerce Commission, which governed the shipment. These provided that the reduced rates specified would "apply on property shipped subject to the condition of carrier's bill of lading," and that otherwise there would be an increased charge, as stated. One of the stipulations of the bill of lading was that "property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival" might be kept in car, depot or warehouse, "subject to reasonable charge for storage and to carrier's responsibility as warehouseman only." The freight bill contained the provision: "Demurrage and storage will be assessed at the expiration of the free time provided by the rules of this Company."

The agent for the Railway Company (confirming what had been said by the plaintiff's witness) testified that after notice of the arrival of the goods, the consignee had paid the entire freight charges, that he (the company's agent) "had accepted the freight" and had the consignee's

"receipt for the goods." Four boxes were then taken away and the rest were permitted to remain to meet the consignee's convenience in removal. The agent further testified. "Q. What was the agreement with reference to holding those goods? A. He just wanted to know if it would be agreeable to leave them there, and I said it would be. Q. You did not make any charges for storing them? A. No, sir. Q. And did not expect him to pay any? No, sir." The consignee's representative had testified that, while nothing had been said on the point, he expected to pay storage.

At the close of the testimony, the plaintiff withdrew his causes of action against the defendant as common carrier and for the penalty, and the case went to the jury solely with respect to the liability of the defendant as warehouseman. The Railway Company moved for a direction of a verdict upon the ground that, under the Federal Act and the tariff regulations, the bill of lading defined the rights of the parties. The motion was denied. The trial court submitted to the jury the question of liability for the care of the goods as one arising under the state law which cast upon the defendant the burden of showing that it was not negligent. The position of the Railway Company, as shown by its requests for instructions which were denied, was that the shipment had not lost its interstate character; that the provisions of the bill of lading were controlling; that the defendant's liability as warehouseman was governed by Federal law; and that the burden was upon the plaintiff to show negligence as a basis for recovery.

Judgment upon a verdict in favor of the plaintiff was affirmed by the Supreme Court of the State. 99 So. Car. 422. With respect to the Federal question, the court said: "The defendant claims that inasmuch as this is an interstate shipment, the Federal statute governs. The question does not legitimately arise in this case for the reason

that the appellant moved for a non-suit on the ground that 'the evidence here shows that this freight arrived here on the 23rd of June and that the freight was paid and receipted for by the agent of Dr. Prescott; he came for it and paid the freight and I submit that where a common carrier delivered freight in good order, and has it in its depot and paid for then its liability as a common carrier ceases.' The court reserved its decision on that question and before it was announced, the plaintiff withdrew the cause of action as common carrier, and also the cause of action for the penalty. It, therefore, being conceded in the Circuit Court that the contract of carriage was ended and the appellant held the goods by a separate contract, the question as to appellant's liability as common carrier and the Federal statute under which it might have arisen is not before this court and the only question argued which we can consider is the question as to warehouseman." The court then applied the rule of liability as defined by the state law. *Id.*, p. 424. And this writ of error has been prosecuted.

As the shipment was interstate, and the bill of lading was issued pursuant to the Federal Act, the question whether the contract thus set forth had been discharged was necessarily a Federal question. The reference, above quoted, to the concession in the trial court cannot be taken to mean that this Federal question was not raised, for, as we have seen, it was distinctly presented and pressed; but we assume that the ruling, in substance, was that there was no dispute as to the fact that the goods had arrived, that the consignee had paid the freight and signed a receipt for the goods, and that the nine boxes had remained in the possession of the carrier under the permission given, as testified, by the carrier's agent. The question is whether this admitted transaction had the legal effect of discharging the contract governed by Federal law and of creating a new obligation governed by state law.

By the Act to Regulate Commerce (§ 1) the 'transportation' it regulates is defined as including "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." It is made the duty of the carrier "to provide . . . such transportation upon reasonable request therefor." All charges made for "any service" rendered in such transportation must be "just and reasonable." Section 6 requires that the carrier's schedules, printed as provided, "shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee." And it is further provided, in the same section, that no carrier shall "extend to any shipper or person any privileges or facilities in the transportation"—that is as defined—"except such as are specified in such tariffs." The bill of lading in accordance with the published regulations provided that "every service" to be performed under it, including the service of the connecting or terminal carrier, should be subject to the conditions specified, and among these was the express condition governing the Company's responsibility as warehouseman for property not removed within forty-eight hours after notice of arrival. Such a retention of the goods was undoubtedly a terminal service forming a part of the 'transportation' in the sense of the Federal Act and governed by that Act. Thus, in the case of *C., C., C. & St. L. Railway Co.* v. *Dettlebach*, 239 U. S. 588, it was held, with respect to goods lost through the negligence of the terminal carrier while in possession as warehouseman under this stipulation, that the provision

of the bill of lading limiting liability to the declared value of the goods was applicable. The court deemed it to be evident "that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the single term 'transportation' and subjected to the provisions of the Act respecting reasonable rates and the like." It is also clear that with respect to the service governed by the Federal statute the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates (*Tex. & Pac. Rwy.* v. *Mugg*, 202 U. S. 242; *Kansas Southern Rwy.* v. *Carl*, 227 U. S. 639, 652; *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97, 112; *Louis. & Nash. R. R.* v. *Maxwell*, 237 U. S. 94), and the established principle applies equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services within the purview of the Act. *Chicago & Alton R. R.* v. *Kirby*, 225 U. S. 155, 166; *Atchison &c. Ry.* v. *Robinson*, 233 U. S. 173, 181. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations. No carrier may extend "any privileges or facilities," save as these have been duly specified. And as the terminal services incident to an interstate shipment are within the Federal Act, and the conditions of liability while the goods are retained after notice of arrival are stipulated in the bill of lading under the filed regulations, the conditions thus fixed are controlling and the parties cannot substitute therefor a special agreement.

In determining, in this view, whether the contract had been discharged, and the case removed from the operation of the Federal Act, regard must of course be had to the substance of the transaction. The question is not one of form, but of actuality. *Texas & N. O. R. R.* v. *Sabine Tram Co.*, 227 U. S. 111, 126; *Louisiana R. R. Comm.* v. *Tex. & Pac. Rwy.*, 229 U. S. 336, 341; *Illinois Central R. R.* v. *Louisiana R. R. Comm.*, 236 U. S. 157, 163; *Pennsylvania R. R.* v. *Clark Coal Co.*, 238 U. S. 456, 458. It is apparent that there had been no actual delivery of the nine boxes. The payment of the freight had no greater effic[illegible]han if it had been made in advance of the transportation. The giving of a receipt for the goods by the consignee did not alter the fact that they were still held by the Railway Company awaiting actual delivery. The transaction at most could not be deemed to accomplish more than if the parties had agreed that until such delivery the goods should be held under a special contract—in lieu of the prescribed conditions, and this they could not effect without violating the Act which governed the shipment. It could not be said, for example, that while under the filed regulations the Railway Company was to make a "reasonable charge for storage" pending delivery that it could agree with a particular shipper, or consignee, to hold gratuitously; nor could it alter the terms of its responsibility while the goods remained undelivered. The actual service in holding the goods continued and we must look to the bill of lading to determine the legal obligation attaching to that service.

Viewing the contract set forth in the bill of lading as still in force, the measure of liability under it must also be regarded as a Federal question. As it has often been said, the statutory provisions manifest the intent of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the diverse re-

quirements of state legislation and decisions. *Adams Exp. Company* v. *Croninger*, 226 U. S. 491, 506, 509, 510; *M., K. & T. Rwy.* v. *Harriman*, 227 U. S. 657, 672; *Boston & Maine R. R.* v. *Hooker, supra; M., K. & T. Rwy.* v. *Harris*, 234 U. S. 412, 420; *Charleston &c. R. R.* v. *Varnville Furniture Co.*, 237 U. S. 597, 603; *C., C., C. & St. L. Ry.* v. *Dettlebach, supra; N. Y., P. & N. R. R.* v. *Peninsula Exchange*, 240 U. S. 34. And the question as to the responsibility under the bill of lading is none the less a Federal one because it must be resolved by the application of general principles of the common law. *Adams Express Co.* v. *Croninger, supra; M., K. & T. Rwy. Co.* v. *Harriman, supra.* It was explicitly provided that in case the property was not removed within the specified time it should be kept subject to liability "as warehouseman only." The Railway Company was therefore liable only in case of negligence. The plaintiff, asserting neglect, had the burden of establishing it. This burden did not shift. As it is the duty of the warehouseman to deliver upon proper demand, his failure to do so, without excuse, has been regarded as making a *prima facie* case of negligence. If, however, it appears that the loss is due to fire, that fact in itself, in the absence of circumstances permitting the inference of lack of reasonable precautions, does not suffice to show neglect, and the plaintiff having the affirmative of the issue must go forward with the evidence. *Cau* v. *Tex. & Pac. Rwy.*, 194 U. S. 427, 432; *Transportation Company* v. *Downer*, 11 Wall. 129, 135; *DeGrau* v. *Wilson*, 17 Fed. Rep. 698, 700, 701, affirmed, 22 Fed. Rep. 560; *Clafin* v. *Meyer*, 75 N. Y. 260, 262, 263; *Whitworth* v. *Erie Ry.*, 87 N. Y. 413, 419, 420; *Draper* v. *D. & H. C. Co.*, 118 N. Y. 118, 122, 123; *St. L., I. M. & S. Ry.* v. *Bone*, 52 Arkansas, 26; *Lyman* v. *Southern Railway*, 132 No. Car. 721; *Lancaster Mills* v. *Merchants' Co.*, 89 Tennessee, 1; *National Line S. S. Co.* v. *Smart*, 107 Pa. St. 492; *Denton* v. *C., R. I. & P. R. R.*, 52 Iowa, 161;

Cox v. *Central Vermont R. R.*, 170 Massachusetts, 129; *Yazoo & Miss. Valley R. Co.* v. *Hughes*, 94 Mississippi, 242; 24 Am. Dec. 150–153, *note;* 22 L. R. A. (N. S.), *note* 975. In the present case, it is undisputed that the loss was due to fire which destroyed the Company's warehouse with its contents including the property in question. The fire occurred in the early morning when the depot and warehouse were closed. The cause of the fire did not appear, and there was nothing in the circumstances to indicate neglect on the part of the Railway Company. The trial court denied the motion for a direction of a verdict and charged the jury that "the burden of showing that there was no negligence is on the defendant." Applying the rule established by the state decisions (*Brunson* v. *Atlantic Coast Line R. R.*, 76 So. Car. 9; *Fleischman* v. *Southern Railway*, 76 So. Car. 237; see also *Wardlaw* v. *S. C. R. R.*, 11 Rich. 337), the Supreme Court of the State overruled the defendant's objection and sustained the judgment. 99 So. Car. 424. It has been recognized by the state court, as was said in the *Fleischman Case*, *supra*, that the rule it applies is a "somewhat exceptional rule" to which the court adheres "notwithstanding the great number of opposing authorities in other jurisdictions." 76 So. Car. 248.

For the reasons we have stated, we think that the obligation of the Railway Company was not governed by the state law and that, in this view, the exceptions of the plaintiff in error were well taken.

Judgment reversed.